Supreme Court, U.S.
FILED
SEP 13 2007
OFFICE OF THE CLERK

No. 07-362

In The
# Supreme Court of the United States

TEEN RANCH, INC., MATTHEW KOCH and MITCHELL KOSTER,

*Petitioners,*

v.

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

BENJAMIN W. BULL
GARY MCCALEB
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, Arizona 85260
(480) 444-0020

KEVIN THERIOT
*Counsel of Record*
JOEL OSTER
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000

MARK P. BUCCHI
550 Stephenson, Suite 202
Troy, Michigan 48083
(248) 589-8800

*Attorneys for the Petitioners*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

Federal and Michigan laws permit faith-based providers of social services to retain their religious character, allow recipients of those services to choose not to be served by such providers, and prohibit discrimination against faith-based providers on the basis of their religious character. Teen Ranch is a Christian residential program for troubled teens and has received referrals from Michigan for over 35 years. Claiming authority to do so under *Locke v. Davey,* 540 U.S. 712 (2003), the Defendants, then called the Michigan Family Independence Agency ("FIA"), disqualified Teen Ranch from referrals because it incorporates religious content into its program.

The questions presented are:

1. Did the Sixth Circuit err in holding, in conflict with *Locke*, that a state official can require a faith-based provider of social services, which is not a seminary, to forfeit its religious beliefs and practices before it can participate in a government program, when the applicable state and federal legislation have expressed a directly opposite intent?

2. Did the Sixth Circuit err in holding, in conflict with the Seventh Circuit's opinion in *Freedom From Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), that an individual's right to veto a religious placement, and thus be assured a secular placement, is not sufficient to make placement a private choice for Establishment Clause purposes?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF THE CASE | 6 |
| REASONS FOR GRANTING THE PETITION | 15 |
| I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *LOCKE V. DAVEY* AND ESTABLISHED FREE EXERCISE JURISPRUDENCE | 17 |
| A. *Locke v. Davey* | 17 |
| B. The Sixth Circuit Improperly Expanded *Locke* | 19 |
| C. Without *Locke* as a Defense, the FIA's Actions Violate the Free Exercise Clause | 21 |
| II. THE SIXTH CIRCUIT'S OPINION ON PRIVATE CHOICE CONFLICTS WITH THE SEVENTH CIRCUIT'S OPINION IN *MCCALLUM* | 22 |
| A. Conflict with the Seventh Circuit's Decision in *McCallum* | 22 |
| B. The Seventh Circuit's Decision is More Consistent with Supreme Court Decisions | 25 |

TABLE OF CONTENTS – Continued

Page

C. Prohibiting Minors from Exercising Private Choice through Adult Proxies Conflicts with *Zelman* ..... 28

CONCLUSION ..... 32

# TABLE OF AUTHORITIES

Page

CASES:

*American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) ..... 26

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) ..... 16, 21

*Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) ..... 15, 21

*Freedom from Religion Foundation. Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) ..... *passim*

*Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp. 2d 905 (W.D. Wis. 2002) ..... 23

*Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002) ..... 24

*Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) ..... 16, 21

*Locke v Davey*, 540 U.S. 712 (2003) ..... *passim*

*McDaniel v. Paty*, 435 U.S. 618 (1978) ..... 16, 21

*Mitchell v. Helms*, 530 U.S. 793 (2000) ..... 17, 21, 27

*Sherbert v. Verner*, 374 U.S. 398 (1963) ..... 16, 21

*Teen Ranch v. Udow*, 479 F.3d 403 (6th Cir. 2007) ..... 1, 14, 20

*Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005) ..... 1, 13, 25, 28

TABLE OF AUTHORITIES – Continued

Page

*Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981) ..... 16, 21

*Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970) ..... 19

*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) ..... *passim*

*Zorach v. Clausen*, 343 U.S. 306 (1952) ..... 18, 19

STATUTES:

42 U.S.C. § 604a ..... 2, 6, 7, 14

42 U.S.C. § 604a(b) ..... 6

42 U.S.C. § 604a(c) ..... 7, 19

42 U.S.C. § 604a(d)(1) ..... 6, 7, 20

42 U.S.C. § 604a(e)(1) ..... 7, 25

Michigan Public Act, section 220(2) ..... 13, 25

Michigan Public Act, section 220(4) ..... 20, 25

U.S. Const. amend. I ..... 1

U.S. Const. amend. XIV, § 1 ..... 2

## OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern District, is reported at 389 F. Supp. 2d 827 (W.D. Mich. 2005), and attached at Appendix ("App.") 18. The panel decision of the Sixth Circuit affirming the District Court opinion is reported at 479 F.3d 403 (6th Cir. 2007), App. 1. The denial of Plaintiff's petition for rehearing and suggestion for rehearing en banc is not reported. App. 54.

## JURISDICTION

The Sixth Circuit entered its order upholding the ruling of the District Court on January 17, 2007. Plaintiffs filed for en banc review, which was denied on June 15, 2007. App. 54. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The relevant federal law, 42 U.S.C. § 604a, states, in part:

> (b) Religious organizations
>
> The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.
>
> (c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom

(1) Religious organizations

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to –

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance

(1) In general

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

Michigan Public Act 172 states:

(1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the

religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

2003 Mich. Pub. Acts 775.

## STATEMENT OF THE CASE

### A. Facts

#### 1. History of Federal and State Laws Regulating Michigan's Residential Care Program

In 1996, Congress enacted, and President Clinton signed into law, significant "Charitable Choice" legislation. 42 U.S.C. § 604a ("The Federal Law"). The Federal Law's stated intent is to permit states to contract with faith-based organizations ("FBOs") to provide various social services without requiring the organizations to compromise their religious character. 42 U.S.C. § 604a(b). This character specifically includes an FBO's right to control the "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1).

To comply with the Establishment Clause, the Federal Law grants recipients of state-funded support the right to refuse placement with FBOs to

which they have a conscientious objection, and to demand re-placement should they find themselves at an FBO to which they object. 42 U.S.C. § 604a(e)(1). It also prohibits states from discriminating against religious organizations on the basis of their "religious character," as defined above. 42 U.S.C. §§ 604a(c) and (d)(1).

Each year since 2001, Michigan has expressly incorporated the Federal Law by reference in each of its annual appropriation statutes for the Michigan Family Independence Agency ("FIA"). These appropriation statutes are collectively called "the Public Act." The Public Act states:

> The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

App. 8.

Like the Federal Law, the Public Act also provides an opt-out clause for any ward who "has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance. . . ." *See id.* at (2). Consequently, if a state official recommends placing a ward at a religious facility, such as Teen Ranch, then the ward has the statutory right to reject that placement, both before and during the ward's stay at Teen Ranch.

### 2. Facts Relating to the FIA's Residential Care Program

The FIA is responsible to provide care and supervision for children who have been committed to or placed in its care through state courts. Each ward is assigned both a caseworker and a lawyer/guardian ad litem ("GAL") to counsel the ward and advocate for the ward. The FIA contracts with 96 private organizations to provide residential youth rehabilitation services ("youth services"). At least 35 of the providers are faith-based organizations. But only Teen Ranch included religious activities in its program. All programs are essentially round the clock in nature. Hence, there is no "separate time and place" available to sequester religious activities. All are paid on a per diem, per capita basis, as opposed to block grants. Hence, they are paid only for the services they perform for wards who are housed with them.

FIA uses a computerized grid to determine what FIA claims is the "best" placement for the child. The computer system considers the child's history and other information to identify the treatment needs, and generates a series of proposed placements "ranked" in descending order of preference. No evidence has been put forward to establish that any second or third choice is substantially inferior to the computer's first choice. Moreover, the FIA does not track, nor does the computer consider, the effectiveness of the various facilities, nor their relative economy. Religion is not a factor in the computerized grid, nor the placement process. FIA is not required to

insist on the computer's first choice of placements for their wards. Hence, this entire procedure is essentially voluntary on FIA's part.

### 3. History of Teen Ranch and its Program

Teen Ranch has provided licensed residential services for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966. It has openly advertised its religious orientation and has unapologetically incorporated religious programming into the services it provides. Teen Ranch, by Board approved policy, does not mandate participation in any religious-themed activity.

### 4. FIA's Imposition of a Moratorium Upon Teen Ranch.

In October 2003, FIA conducted a "Quality Assurance Review" ("QAR") of Teen Ranch. The QAR unveiled areas of alleged noncompliance, of which all but the religious program at Teen Ranch were resolved by the end of 2003, and are thus irrelevant. On November 6, the FIA sent a letter to Teen Ranch outlining "violations of particular significance" and issued a moratorium on further placements. Among these "violations" was the incorporation of religious activity in the Teen Ranch program.[1] On December

[1] The QAR also included unsubstantiated allegations that Teen Ranch coerced roughly ten wards into participating in

(Continued on following page)

16, FIA sent a letter to Teen Ranch, stating, "It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans." App. 4. On December 17, a meeting was held between the parties where Teen Ranch maintained its position of incorporating its religious beliefs into its youth services on a voluntary basis. In response to FIA's request to discontinue all religious activities, Teen Ranch issued the following statement:

> The mission statement of Teen Ranch states, "providing hope to young people and families through life changing relationships and experiences from a Christian perspective." This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing

---

religious activities. At no time in the next six months did FIA remove any of the allegedly offended wards, notify them or their caseworkers and lawyer/GALs of their statutory rights to demand relocation to a secular program, or tell Teen Ranch which wards objected to the religious programming. Instead, FIA demanded the removal of all the religious programming at Teen Ranch.

> home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

App. 5.

On January 9, the FIA told Teen Ranch that faith-based "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities," (App. 6) and, concluded "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium." App. 6.

### 5. Teen Ranch Efforts to Avoid Litigation via Compliance with State and Federal Law, and FIA's Temporary Compliance with the Law

On several occasions, Teen Ranch pled with FIA to follow the above referenced laws and permit Teen Ranch to retain its religious character and still participate in the state's residential care program. On

January 21, 2004, Teen Ranch sent FIA a letter informing them of the Public Act and the Federal Law, and requested they abide by the laws. App. 6, 56. On January 30, Teen Ranch representatives met with FIA, presented them with the Public Act and the Federal Law, and invited FIA to join Teen Ranch in obeying these statutes. Teen Ranch even gave FIA disclosure documents detailing Teen Ranch's religious character to give to potential placements, and implement the federal and state "opt-out" rights.

On February 20, 2004, Teen Ranch filed suit and requested a TRO. On February 23, Teen Ranch filed a Motion for Preliminary Injunction. On February 23, 2004, in response to Teen Ranch's Motion for TRO and Preliminary Injunction, FIA lifted the moratorium and temporarily implemented the statutory practices Teen Ranch had urged at the January 31, 2004 meeting. App. 7. Wards were given notice of Teen Ranch's religious character and advised of their right to refuse placement at Teen Ranch. Two new youth agreed to enroll at Teen Ranch in the next month. In early April, 2004, after the District Court denied Teen Ranch a Preliminary Injunction, FIA reimposed the moratorium, and discontinued the above noted practice.

### B. The District Court Opinion

The District Court correctly identified the controlling question in this case as "whether the ability of youth to opt out of the Teen Ranch program pursuant

to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct." *Teen Ranch*, 389 F. Supp. 2d at 834-35, App. 33. The District Court was "aware of no case that has examined the issue of whether an opt-out provision is sufficient to constitute 'true private choice.'" *Id.* at 836, App. 36. The court also mentioned that the wards' youth prevented them from exercising private choice involving religious matters. *See id.* at 837, App. 39. The District Court then held that FIA could not place youth at Teen Ranch without violating the Establishment Clause. *Id.*

Upon concluding that private choice did not exist, the District Court quickly dispensed with Teen Ranch's other claims. *See Teen Ranch*, 389 F. Supp. 2d at 838-42, App. 40-52. It relied upon *Locke* in concluding that FIA had the discretion to refuse to contract with an FBO until it purged itself of its religious character. *Teen Ranch,* 389 F. Supp. 2d at 831, App. 24. The court neither noted nor addressed the fact that both Congress and the Michigan Legislature expressed the opposite intent, i.e., to permit faith-based organizations to participate in residential care programs without sacrificing their religious character. Moreover, the court failed to note that *Locke* was, by the majority opinion's own words, limited to "the religious training of clergy." 540 U.S. at 722, n. 5. No one contends that Teen Ranch is a seminary.

### C. The Sixth Circuit Opinion

The Sixth Circuit essentially adopted the District Court's opinion. "[T]he district court identified the applicable law at issue – § 220 of the Michigan State Appropriations Bill, 2003 P.A., 172 ('Public Act') – which governs contracts between the FIA and faith-based organizations and also instructs the FIA to follow the guidelines set forth in 42 U.S.C. § 604a." *Teen Ranch v. Udow,* 479 F.3d 403, 408 (6th Cir. 2007), App. 7-8. "The district court properly recognized that this case turns on whether the FIA's funding of Teen Ranch is indirect, rather than direct, because the funding is 'a result of the genuine and independent choices of private individuals.'" *Id.* at 408-409, App. 9-10, *quoting Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

After reiterating the District Court's opinion, the Sixth Circuit stated,

> [W]e believe that the district court was correct in reaching its conclusions and granting summary judgment in favor of the FIA. For the same reasons identified by the district court, we conclude that the opt out provision of the Public Act did not provide the children placed in the care of the FIA with "true private choice." Likewise, after carefully considering the applicable law, we also reject all five of Teen Ranch's arguments for the reasons articulated by the district court.

*Teen Ranch*, 479 F.3d at 410 (emphasis added), App. 13-14.

## REASONS FOR GRANTING THE PETITION

This Court should grant review to enforce the proper understanding of *Locke*, to settle a circuit split between the Sixth and Seventh Circuits as to whether an "opt-out" is private choice, and to affirm that, consistent with this Court's holding in *Zelman,* adults can exercise private choice for minors for whom they are legally responsible.

In *Locke*, the Supreme Court upheld a Washington statute that prohibited state scholarships being issued to students studying for the clergy. The majority opinion limited the holding to state funding of *clerical* studies. The Court cautioned that the opinion should not be read to give the states broad discretion to discriminate based on their "philosophical preferences." *See* 540 U.S. 722, n. 5.

The Sixth Circuit erroneously expanded the holding in *Locke* well beyond these stated limits and, in so doing, held that state bureaucrats may disregard federal and state law and form First Amendment public policy based solely on personal preference. The decision below essentially grants bureaucrats virtually unlimited "play in the joints" to discriminate against religious organizations at will.

In so extending *Locke*, the Sixth Circuit trampled on the Free Exercise Clause. Prior to *Locke*, this Court's long-standing jurisprudence forbade targeting religious beliefs for negative discriminatory treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990);

*Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (requiring students to choose between their religious beliefs and receiving a government benefit); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). *Locke* did not purport to disturb this settled norm, yet that is precisely what the court below has done.

In addition, this Court should settle the conflict between the Sixth and the Seventh Circuits as to whether an "opt-out" creates private choice. In *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a Wisconsin state agency placed parolees in a Christian half-way house that incorporated religion into its treatment program. As in this case, the parolee had the right to refuse the placement on religious grounds and demand an alternative. The Seventh Circuit affirmed that this right to reject the suggested placement created true private choice, and thus the Establishment Clause was satisfied (i.e., the aid to religion was "indirect"). *Id.* at 882.

The Sixth Circuit ignored *McCallum* and held the polar opposite. This Court should settle the conflict and rule that both an opt-out and a selection initiated by the individual achieve the same end. In both instances the individual cannot be coerced to accept religious programming, and the Establishment

Clause is satisfied. The method of assuring neutrality encoded in the Federal Law and Public Act, consistent with the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), is to provide a system of private choice so that no government dollars go to a religious organization except in accordance with the private choice of an individual. An opt-out provision satisfies this concern.

## ARGUMENT

### I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *LOCKE V. DAVEY* AND ESTABLISHED FREE EXERCISE JURISPRUDENCE.

FIA and both courts erroneously extended *Locke* far beyond and contrary to its stated limits and underlying rationale.

#### A. *Locke v. Davey*

In *Locke*, this Court upheld a Washington statute that prohibited state scholarships for students studying to become clergy. *See* 540 U.S. at 725. The holding was explicitly limited to the issue of funding for "the religious training of clergy." *Id.* at 722, n. 5, 722-24. The Court explained that this narrow decision reflected long-standing historical concerns over public funding of the clergy. It did not apply to general religious studies. In fact, the program in question "permitt[ed] students to attend pervasively religious schools, so long as they [were] accredited." *Id.* at 724.

In addition, this Court did not grant even state legislatures, much less state employees, permission to discriminate against religion based on their own "philosophical preferences." *See id.* at 722 n. 5. Nowhere were the "philosophical preferences" of state bureaucrats indulged or endorsed as legitimate "play in the joints." *Id.*

> Justice Scalia notes that the State's "philosophical preference" to protect individual conscience is potentially without limit, see *post,* at 1318; however **the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference" commands.**

*Id.* at 722 n. 5 (emphasis added).

*Locke* was thus fully consonant with this Court's earlier teaching expressed in *Zorach v. Clausen,* 343 U.S. 306 (1952), where Justice Douglas wrote for the majority:

> We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions.

343 U.S. at 313-14; *see also Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970) (quoting the *Zorach* excerpt and using the phrase "play in the joints").

In *Locke,* the Court reaffirmed that governments have some "play in the joints" between the Free Exercise and Establishment Clauses. However, this Court was careful to clearly identify the unique circumstances at work in *Locke*. Both the FIA and the Sixth Circuit completely disregarded this cautionary limitation.

### B. The Sixth Circuit Improperly Expanded *Locke*.

The Sixth Circuit cited *Locke* to excuse FIA's discrimination. As a result, the court below allowed state employees to override the express will of the state legislature, in an area that no one contends involves seminary training or some comparable historically rooted exclusion.

Two weeks after *Locke* was issued, FIA cited it to the District Court as justification for its discrimination against Teen Ranch. However, FIA's actions run directly contrary to the requirements of the Federal Law and Public Act, and represent, if anything, a species of "bureaucratic veto" nowhere endorsed in *Locke*. The Federal Law explicitly prohibits discrimination against religious organizations in contracting for social services programs. 42 U.S.C. § 604a(c). It permits FBOs to participate in publicly funded social

service programs without compromising their religious character.

> The purpose of this section is to allow states to contract with religious organizations . . . without impairing the religious character of such organizations.

42 U.S.C. § 604a(d)(1).

The law defines "religious character" to include the organization's "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1). The State of Michigan adopted the Federal law by reference, and directed FIA to implement these guidelines in all their dealings with faith-based organizations. *See Teen Ranch*, 479 F.3d at 408 (quoting the Public Act, section 220(4)), App. 8.

The philosophical preferences upon which FIA has acted are clearly contrary to these statutory policies. Debora Buchanan, the Manager for the Purchased Care Division for FIA, testified:

> My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera. . . .

App. 71.

Hence, Congress and Michigan gave FIA specific instructions to include openly religious organizations in eligibility for state contracts. *Contrary to Locke,* the bureaucrats in FIA simply disagreed.

It is uncontested that Teen Ranch confers no clerical degrees, nor is it in any way a seminary. While Teen Ranch is a religious organization, *Locke* does not endorse discrimination against even "pervasively religious" programs. 540 U.S. at 724; *see also Mitchell,* 530 U.S. at 809-10. Consequently, the Sixth Circuit misread *Locke*.

### C. Without *Locke* as a Defense, the FIA's Actions Violate the Free Exercise Clause.

Absent the erroneously claimed endorsement of *Locke,* the actions of FIA plainly violate this Court's established jurisprudence regarding the Free Exercise Clause. This Court has never upheld state action that specifically targets religious beliefs for disparate treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Yet, this is exactly what FIA did to Teen Ranch, specifically targeting Teen Ranch's religious beliefs and mandating they cease practicing their religious beliefs before they can participate in the state's youth services program. App. 6.

## II. THE SIXTH CIRCUIT'S OPINION ON PRIVATE CHOICE CONFLICTS WITH THE SEVENTH CIRCUIT'S OPINION IN *MCCALLUM*.

FIA and the lower court opinion contend that the statutes in question fail to accord private choice. The Sixth Circuit found that private choice was lacking on two counts. First, the court below held that the rights to reject placement at an FBO, and to demand relocation, fail to constitute genuine private choice, since the ward does not, as it were, "choose from a menu of options." This holding contradicts the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). Second, the court below held that the wards, as minors, were too young to exercise private choice, notwithstanding that each ward is assisted by parents and assigned a caseworker and lawyer/GAL as a matter of law to assist them. This holding runs counter to *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

### A. Conflict with the Seventh Circuit's Decision in *McCallum*

In 2003, the Seventh Circuit held that a parolee's right to reject a parole officer's selection of a Christian half-way house for his parole house sufficed to create private choice. *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). On all relevant factual points, this case is indistinguishable from *McCallum*.

In *McCallum,* parolees were clearly under the jurisdiction of the state (Wisconsin). A state agent would review the parolee's *dossier* and personally select a halfway house to help transition the parolee back into society. The Seventh Circuit described the process as follows:

> If a convicted criminal is out on parole (or probation, but we need to discuss that separately) and living in Milwaukee and he violates the terms of parole, his parole officer may offer him, as an alternative to being sent back to prison, enrollment in one of several halfway houses. The officer can recommend a specific halfway house – the one he thinks best for the particular offender – but the offender is free to choose one of the others.

*Id.* at 881.

One of the facilities officers suggested was Faith Works, a Christian halfway house that incorporated Bible reading and similar devotional exercises in their daily programs. If the parole officer selected Faith Works, the parolee was entitled to reject placement if he/she objected to the religious programming. *See Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). In such a case, the agent was required to find a suitable secular house. The halfway houses, including Faith Works, were compensated under a per diem, per capita contract with the state, and were, in effect, paid only

for the specific parolees they served, while they served them.

The Seventh Circuit held that the parolees' right to reject a placement was sufficient to create private choice.

> The choice must be private, to provide insulating material between government and religion. It *is* private; it is the offender's choice.

*Id.* at 882. *See also Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950, 971 (W.D. Wis. 2002), *on reconsideration in part*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003) (explaining in detail the opt-out system permitting parolees to reject a placement to a religious half-way house initially suggested by the parole officer).

Thus, the Seventh Circuit found the state's placement process to be equivalent to the voucher program endorsed by this Court in *Zelman,* and concluded "there is no difference" between the practices of the Wisconsin correctional officers and the voucher system in *Zelman. See* 324 F.3d at 882. It held that the right to reject an undesired placement in a religious program is indistinguishable from the individual selecting from a "menu" without input from a state agent. Both are private choice.

In this case, the wards are under the jurisdiction of FIA, just as the Wisconsin parolees were under the jurisdiction of their state. In both, one facility is

available that incorporates religious activities in its program, and many others do not. In both, the state agent can or does initiate the placement process. In Wisconsin, the agency permits the parolee to reject the religious placement and choose another. In the present case, the Federal Law and Public Act both require that a ward who objects to Teen Ranch's religious character must be reassigned or relocated, yielding a placement that does not incorporate religion. 42 U.S.C. § 604a(e)(1); Public Act Section 220(2) and (4), App. 8-9.

Contrary to the Seventh Circuit, the Sixth Circuit held that the option to reject an unwanted placement did not suffice to create private choice. Rather, it endorsed the holding that, in order for true private choice to exist, the ward must select from a "menu" of choices. *See Teen Ranch*, 389 F. Supp. 2d at 836, App. 36 ("Although the children have the ability to opt out of a religious program, they do not have the ability to choose or reject a religious program from a menu of secular and religious programs").

### B. The Seventh Circuit's Decision is More Consistent with Supreme Court Decisions.

The apparent rationale for the Sixth Circuit's decision is the ephemeral distinction between an individual affirmatively "selecting from a menu," versus an individual rejecting an unwanted placement. But as the Seventh Circuit held in *McCallum*,

there is no constitutional difference. By either means, any individual who desires a purely secular placement is guaranteed one. He either chooses it, or rejects a religious alternative. By either means, the recipient has the power to reject an unwanted religious placement. His placement coincides with his personal desire, and is, therefore, a genuine private choice. The Establishment Clause is satisfied. The state is neutral. No governmental endorsement of religion occurs.

The D.C. Circuit put the point succinctly in *American Jewish Federation v. Corporation for National and Community Service,* 399 F.3d 351 (D.C. Cir. 2005). When confronted with a similar objection that a majority of placements in a particular program were religious, and that the "choices" were "limited," the D.C. Circuit held:

> Of course the number of such opportunities is "limited." It could scarcely be unlimited. **The important points are** (1) there are a numerous AmeriCorps teaching positions in public and private secular schools; and (2) that there is no evidence of any participant who wanted to teach in a secular school, **but was impermissibly channeled** to a religious school.

399 F.3d at 358 (emphasis added).

To paraphrase the D.C. Circuit, it is immaterial whether the individual's state employed "waiter" gets to suggest an entree from a "menu." It only matters

that the waiter may not demand the individual accept his suggestion. Whether the absence of coercion is accomplished by the state-employed "waiter" standing mute or, as in our case, the applicable statutes requiring him to defer to the individual's objection, is, from the perspective of the Establishment Clause, immaterial. The *individual's* choice, the *private* choice, prevails in either event. The Seventh Circuit, in *McCallum,* reflects this logic. The Sixth Circuit, in this case, denies it. The essence of private choice is the absence of government coercion, not the mere formalism of who initiates a conversation leading to the placement. *See also McCallum*, 324 F.3d at 883 ("The plaintiffs argue that by recommending Faith Works to some offenders, parole officers steer the offenders to a religious program and by doing so provide governmental support to religion. The implications of the argument are unacceptable.")

Hence, just as *Mitchell* dispensed with the immaterial formalism of whether a voucher check was made out to the school or was endorsed over to the school by the student or his parents, it is immaterial in the context of private choice whether the placement results from an individual "choosing from a menu" or rejecting unwanted alternatives until one meets with his approval. *See* 530 U.S. at 793. In either event, it is the choice of the individual, not the will of the state, that determines the placement. This is private choice.

### C. Prohibiting Minors from Exercising Private Choice through Adult Proxies Conflicts with *Zelman*.

The final basis upon which the Sixth Circuit ruled was the minority of the wards. The Sixth Circuit upheld the District Court ruling in that:

> **Regardless of whether state wards are particularly vulnerable, they are children.** The Court believes this fact cannot be ignored as the Court considers whether an opt-out provision is sufficient to make the ward's choice a "true private choice."

*Teen Ranch*, 389 F. Supp. 2d at 835, App. 34.

The lower courts cited to this Court's school prayer cases and, in particular, to language citing "heightened concerns" appropriate to the youth of school children. The courts did not discuss or opine as to why, given that each ward is attended to by a caseworker, a lawyer and, frequently, their parents, the private choice could not be exercised through any of these trained adults' mediation.

The court's holding at least implies that private choice may not be exercised by or for minors. This contradicts the decision in *Zelman* and is a complete misapplication of school prayer jurisprudence.

*Zelman* sustained a voucher program for parochial schools against an Establishment Clause challenge by finding that vouchers are an exercise of private choice. *See* 536 U.S. at 653. Obviously, the

students involved who would be attending the classes were minors enrolled in grades K-12. All or substantially all of them were enrolled in schools chosen for them by their parents or legal guardians. After reviewing this Court's "consistent and unbroken" chain of decisions on "true private choice," this Court reframed the issue in terms that inevitably dispel the notion that private choice cannot be exercised by youth or on behalf of youth by responsible adults.

> The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools.

*Id.* at 655-56.

Obviously, if private choice cannot be exercised by or for youths through the counsel and intercession of responsible adults, it would have been impossible for this Court to frame the issue as it did and to reach its ultimate holding:

> In sum, the Ohio program . . . permits such individuals to exercise genuine private choice among options public and private, secular and religious. The program **is therefore a program of true private choice**.

*Id.* at 662 (emphasis added).

With that, this Court reversed the Sixth Circuit and approved the Cleveland voucher program. Hence, *Zelman* decisively dispels the notion that private choice is impossible where the program beneficiary is a minor.

*Zelman* also illustrates the error of the lower court's invocation of the school prayer cases. Indeed, those decisions themselves illustrate their complete irrelevancy to private choice analysis. In none of these decisions did the term "private choice" even appear. In *Zelman,* none of these decisions were cited by the majority, and no justice writing a dissent argued that, owing to these decisions, private choice could not be exercised by or for minors by responsible adults. Hence, it is clear that considerations informing school prayer cases and the "heightened concerns" relative to youth cited by the Sixth Circuit are inapposite when considering a case of private choice.

Private choice can readily be exercised by youths, aided by responsible adults. In this case, it is uncontested that each ward has numerous trained adults assigned who are capable of serving this purpose. App. 20. No one has proffered any evidence to the contrary.

Moreover, the very nature of private choice demonstrates the irrelevance of the "heightened concerns" addressed in the school prayer cases. In all school prayer cases, a common fact was that, despite the alleged "voluntariness" of the religious observances under attack, it remained true that the objecting youth would remain enrolled in the same school, subject to questioning, peer pressure, and the like. Under the statutes in question here, the unwilling youth is relieved of the entire unwanted environment. The youth goes elsewhere, to a secular facility. Given that no other program in Michigan includes religious

activities, the objecting ward is guaranteed to be placed at an organization without such activities. Even if more facilities began to include religious features, the statutory rights are unlimited, such that the availability of a secular environment remains an absolute guarantee. Hence, unlike all the school prayer cases, Michigan wards who object to Teen Ranch's religiosity need never be at Teen Ranch, nor be subjected to any allegedly "coercive environment" that might exist there. Indeed, minors in this case actually enjoy *greater* free choice than the children in *Zelman*, who had no legal right to veto their parents' choices.

Consequently, the Sixth Circuit's final basis for denying Teen ranch the relief it seeks, the "youth exception" is, again, meritless.

## CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

BENJAMIN W. BULL, ESQ.
GARY MCCALEB, ESQ.
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 440-0028

KEVIN THERIOT, ESQ.
*Counsel of Record*
JOEL OSTER, ESQ.
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66226
Telephone: (913) 685-8000
Facsimile: (913) 685-8001

MARK P. BUCCHI
Mich. Bar No. P32047
550 Stephenson, Suite 202
Troy, Michigan 48083
Telephone: (248) 589-8800
Facsimile: (248) 589-3303

479 F.3d 403

United States Court of Appeals, Sixth Circuit.

**TEEN RANCH, INC.**, Matthew Koch, and Mitchell Koster, Plaintiffs-Appellants,

v.

Marianne UDOW, Musette Michael, and Debora Buchanan, Defendants-Appellees.

**No. 05-2371.**

Argued Oct. 25, 2006.

Decided and Filed Jan. 17, 2007.*

**ARGUED:** Joel L. Oster, Alliance Defense Fund, Leawood, KS, for Appellants. Joel D. McGormley, Michigan Department of Attorney General, Lansing, MI, for Appellees. **ON BRIEF:** Joel L. Oster, Kevin H. Theriot, Alliance Defense Fund, Leawood, KS, Gary McCaleb, Alliance Defense Fund, Scottsdale, AZ, for Appellants. Joel D. McGormley, Michigan Department of Attorney General, Lansing, MI, for Appellees. Daniel Mach, American Civil Liberties Union, Washington, DC, Kary L. Moss, American Civil Liberties Union, Detroit, MI, David S. Prohofsy, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL, for Amici Curiae.

Before: KEITH, COLE, Circuit Judges; STEEH, District Judge.**

---

* This decision was originally issued as an "unpublished decision" filed on January 17, 2007. On January 31, 2007, the court designated the opinion as one recommended for full-text publication.

DAMON J. KEITH, Circuit Judge.

Plaintiffs-Appellants, collectively referred to as "Teen Ranch,"[1] appeal the district court's grant of summary judgement in favor of Defendants-Appellees, collectively referred to as the Family Independence Agency ("FIA"),[2] on Teen Ranch's constitutional and statutory religious discrimination claims. For the following reasons, we AFFIRM the district court's grant of summary judgement.

## I.

The FIA, a department of the Michigan state government, is responsible for providing care and supervision to abused, neglected, and delinquent children who have been committed to or placed in its care through state courts. The FIA is authorized to contract with private organizations to provide placement services. The FIA contracts with 96 private child-care agencies to provide residential services to youth for stays averaging four to twelve months. At

---

** The Honorable George Caram Steeh, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] Plaintiffs-Appellants are Teen Ranch, Inc.; Matthew Koch, its Chief Executive Officer; and Mitchell Koster, its Chief Operating Officer.

[2] Defendants-Appellees are Marianne Udow, Director of the FIA; Musette Michael, Interim Director of the FIA; and Debora Buchanan, Manager of the Purchased Care Division of the FIA.

least 35 of the providers are faith-based organizations.

Once a child is placed in the care of the FIA, a computerized grid is then used to determine the best placement for the child. The computer system considers the child's history, family history, any relevant psychological or psychiatric information, and other information identifying the child's treatment needs. The computer then selects a service provider that best matches the child's needs.

Teen Ranch, one of the 35 faith-based providers that contract with the FIA, is an organization that has provided licensed and residential services for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966. Teen Ranch has openly advertised its religious orientation, and has admittedly incorporated religious programming into the services it provides under the FIA contract. However, Teen Ranch maintains that participation in the religious programming is voluntary since its policy does not mandate participation in any religious activity, including church services. Specifically, its program involves voluntary prayers before meals, voluntary devotions during the week, voluntary church attendance, and voluntary discussions concerning the Christian faith between staff and the children.

Between October and November of 2003, the FIA conducted a "Quality Assurance Review" ("QAR") of the Teen Ranch program. The QAR unveiled several

areas of contract and policy noncompliance. Therefore, on November 6, 2003, the FIA, through Debora Buchanan ("Buchanan"), sent a letter to Teen Ranch outlining "violations of particular significance" and issuing a moratorium on further placements at Teen Ranch. The QAR also uncovered evidence, which was later confirmed, in the form of youth reports, interviews with residents, and Teen Ranch's brochure, that Teen Ranch coerced children into participating in religious activities. Thereafter, Teen Ranch's incorporation of religious practices into its programming became the FIA's chief concern.

On December 2, 2003, the FIA issued a "Quality Assurance Program Review Report" to Teen Ranch and requested, within 30 days, a "Quality Improvement Plan" addressing all of their concerns. Teen Ranch subsequently submitted a "Corrective Action Plan" ("CAP" or "plan"), and on December 16, 2003, Buchanan sent a letter responding to Teen Ranch's plan. In addition to detailing the areas of Teen Ranch's CAP that did not adequately ensure compliance, the letter also addressed Teen Ranch's representation that youth are not required to participate in religious programming. Buchanan stated, "It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans." (J.A. at 251). On December 17, 2003, a meeting was held between the FIA and Teen Ranch where Teen Ranch continued to maintain its position of incorporating its religious

beliefs into treatment programming. At the conclusion of that meeting, and in response to the FIA's request for an amended CAP concerning the religious practices, Teen Ranch issued the following statement, in pertinent part:

> The mission statement of Teen Ranch states, "*providing hope to young people and families through life changing relationships and experiences from a Christian perspective.*" This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing home [sic], recreational time in the gymnasium, or watch [sic] television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

(J.A. at 640) (emphasis in original).

By early January 2004, Teen Ranch had submitted an amended CAP that addressed all of the violations identified by the FIA, with the exception of the incorporation of religious practices in its programming. Accordingly, on January 9, 2004, the FIA informed Teen Ranch, by letter, that while it supports the important role that faith-based organizations play in providing quality services to Michigan youth and families, "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities." (J.A. at 252). Furthermore, it stated that "[t]he incorporation of faith specific tenets into treatment is not permitted by state and federal law[,]" and "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, [the] FIA is unable to approve the corrective action plan and rescind the moratorium." (J.A. at 252).

On January 21, 2004, Teen Ranch, submitting federal and state law that purportedly supports its claim, issued a letter detailing its position and denying allegations of coerced religious participation. On January 30, 2004, the FIA and Teen Ranch met again but to no avail. The parties continued their discussion; however, a solution regarding the incorporation of religious programming was not reached. Ultimately, on February 20, 2004, Teen Ranch filed suit pursuant to 42 U.S.C. § 1983, alleging violations of: (1) the Free Exercise Clause of the First Amendment;

(2) the Free Speech Clause of the First Amendment; (3) the Due Process Clause of the Fourteenth Amendment; (4) the Equal Protection Clause of the Fourteenth Amendment; and (5) 42 U.S.C. § 604a.

On February 23, 2004, Teen Ranch moved for a temporary restraining order, which was denied on the same day. Thereafter, Teen Ranch moved for a preliminary injunction. At the advice of counsel, the FIA briefly lifted the moratorium to prepare for the preliminary injunction hearing. On April 1, 2004, the district court denied Teen Ranch's preliminary injunction motion. Upon the denial of the motion, the FIA reinstated the full moratorium. On February 17, 2005, both parties filed cross-motions for summary judgment. On September 29, 2005, the district court issued an opinion granting summary judgment in favor of the FIA. Teen Ranch timely filed the present appeal.

## II.

We review *de novo* a district court's grant of summary judgment. *May v. Franklin County Comm'rs,* 437 F.3d 579, 583 (6th Cir.2006).

The district court properly considered Teen Ranch's constitutional and statutory claims, and correctly granted judgement in favor of the FIA. As a preliminary matter, the district court identified the applicable law at issue – § 220 of the Michigan State

Appropriations Bill, 2003 P.A. 172 ("Public Act")[3] – which governs contracts between the FIA and faith-based organizations and also instructs the FIA to follow the guidelines set forth in 42 U.S.C. § 604a,[4]

---

[3] In full, section 220 provides:

> (1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.
>
> (2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.
>
> (3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.
>
> (4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

2003 Mich. Pub. Acts 775.

[4] In pertinent part, 42 U.S.C. § 604a provides that:

(Continued on following page)

the federal statute that governs contracts between states and charitable, religious or private organizations. The district court properly recognized that this case turns on whether the FIA's funding of Teen

---

(b) . . . The purpose of this section is to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) . . . In the event a State exercises its authority . . . religious organizations are eligible, on the same basis as any other private organization . . . so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. . . .

(e) . . . (1) . . . If an individual . . . has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance . . . the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization. . . .

(i) . . . Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) . . . No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization.

Ranch is indirect, rather than direct, because the funding is "a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002); *see also Mitchell v. Helms,* 530 U.S. 793, 810, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (Supreme Court stating that it has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals[ ]'" rather than "the unmediated will of government.") (quoting *Agostini v. Felton,* 521 U.S. 203, 226, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).[5] Accordingly, the district court examined "whether the ability of youth to opt out of the Teen Ranch program pursuant to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct." *Teen Ranch v. Udow,* 389 F.Supp.2d 827, 834-35 (W.D.Mich.2005).

After a thorough analysis, the district court concluded that the opt out provision of § 220(2) of the Public Act did not equate to a "true private choice," since "the State selects the [youth's] residential

---

[5] "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Mitchell,* 530 U.S. at 810, 120 S.Ct. 2530.

placement, . . . [and the youth's] ability to opt out of placement at a faith-based institution with religious programming is not sufficient to avoid Establishment Clause problems because State placements at Teen Ranch would advance or endorse a particular religious viewpoint." *Id.* at 836. Therefore, since the opt out provision does not give youth "true private choice," the district court held that "the State cannot fund placements at Teen Ranch [given its religious programming] without running afoul of the Public Act and the Establishment Clause." *Id.* at 837; *see also Mitchell,* 530 U.S. at 816-17, 120 S.Ct. 2530 (holding that "[a]ny money that ultimately went to religious institutions . . . as a result of the genuinely independent and private choices of individuals" is valid. (internal quotations and citation omitted)). In addition, the district court properly regarded the youth and vulnerability of the class of citizens at issue here as a relevant consideration. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.") (citing *School Dist. of Abington v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844, (1963)) (Goldberg, J., concurring); *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 261-262, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (Kennedy, J., concurring).

Following the determination that § 220(2) of the Public Act did not provide a "true private choice," the district court proceeded to address Teen Ranch's five claims. Rejecting Teen Ranch's Free Exercise Clause claim, the district court distinguished *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and the line of cases following *Sherbert,* which held that the government could not deny a public benefit based on a worker's religious beliefs, and concluded that "[u]nlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit." *Teen Ranch,* 389 F.Supp.2d at 838. In addition, relying on *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), which held that a state scholarship program that excluded students pursuing degrees in theology did not violate the Free Exercise Clause, the district court concluded that the FIA's failure to fund Teen Ranch's religious programming does not violate Teen Ranch's free exercise rights. *Id.*

Turning to Teen Ranch's free speech claim, the district court held that the FIA's decision to contract out its child services did not create a forum for private speech since "[t]he purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care." *Id.* at 840. As to the due process claim, the district court disagreed with Teen Ranch because the FIA instituted the moratorium according to the standards set forth in the Public Act which "guide the FIA regarding

contracts with faith-based organizations and restricts the FIA from directly funding sectarian activities." *Id.* Likewise, the district court rejected Teen Ranch's equal protection claim because there was no evidence of a similarly-situated private placement facility that "incorporate[d] religion as an integral part of its residential program." *Id.* at 841. The district court further explained that, even if Teen Ranch was similarly-situated, the FIA's "desire to avoid violating the Establishment Clause . . . is sufficient to meet the rational basis test." *Id.*

In denying Teen Ranch's fifth and final claim under 42 U.S.C. § 604a, the district court, citing § 604a(i), noted that the statute does not create any private rights enforceable in federal court. The district court also recognized that § 604a applies only to programs funded under Titles I, II, and IV-A of the Social Security Act, and the "FIA is funded for a portion of its foster care placement costs under Title IV-E . . . rather than Title IV-A." *Id.* at 841-42. Also, under its fifth claim, Teen Ranch alleged to have made a state law claim under § 220 of the Public Act. However, the district court found insufficient evidence to support this allegation, and to the extent a state claim was alleged, the district "[c]ourt decline[d] to exercise supplement[al] jurisdiction . . . because the [c]ourt had dismissed all of the federal claims over which it had original jurisdiction." *Id.* at 842.

After thoroughly reviewing the record, we believe that the district court was correct in reaching its conclusions and granting summary judgment in favor

of the FIA. For the same reasons identified by the district court, we conclude that the opt out provision of the Public Act did not provide the children placed in the care of the FIA with "true private choice." Likewise, after carefully considering the applicable law, we also reject all five of Teen Ranch's arguments for the reasons articulated by the district court. The district court's opinion was sound, as it clearly articulated and provided the reasoning for rejecting Teen Ranch's constitutional claims.

While we are satisfied with affirming on the basis of the district court's well-considered opinion, we will take this opportunity to further consider the viability of Teen Ranch's fifth claim – a § 1983 action alleging violation of rights under 42 U.S.C. § 604a, a federal statute which provides a specific remedy that requires "[a]ny party which seeks to enforce its rights . . . may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation." 42 U.S.C. § 604a(i). The district court, understandably, did not address this issue. However, we believe it warrants consideration since both Teen Ranch and the FIA dedicate considerable efforts to this claim.

It is settled that "[42 U.S.C.] § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations." *Suter v. Artist M.*, 503 U.S. 347, 355, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (citing *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980)). However, "§ 1983

does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005). For example, "§ 1983 is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter,* 503 U.S. at 355-56, 112 S.Ct. 1360 (quoting *Wright v. Roanoke Redev. & Hous. Auth.,* 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987)).

"Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *Abrams,* 544 U.S. at 120, 125 S.Ct. 1453. "Even after this showing, . . . [t]he defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right." *Id.* "[C]ongressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Id.* (quoting *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997)). Moreover, "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at 121, 125 S.Ct. 1453. However, "[t]he ordinary inference that the

remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983." *Id.* at 122, 125 S.Ct. 1453. The party seeking to enforce the federal statutory right bears the burden of demonstrating that Congress intended to create the private federal remedy sought. *Suter,* 503 U.S. at 363-64, 112 S.Ct. 1360.

In the instant matter, 42 U.S.C. § 604a(i) expressly provides that a plaintiff's remedy under § 604a resides exclusively in state court. As such, we must conclude that "Congress did not intend to leave open a more expansive remedy under § 1983." *Abrams,* 544 U.S. at 121, 125 S.Ct. 1453. As noted in *Abrams,* "'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Alexander v. Sandoval,* 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)). Likewise, 42 U.S.C. § 604a does not provide a textual indication, express or implicit, that the remedy provided for in state court is complementary to the remedies available under § 1983. Teen Ranch has failed to provide, as it must, any evidence indicating that § 604a(i) was not intended to foreclose or supplant the available remedies under § 1983. Accordingly, Teen Ranch's rights under 42 U.S.C. § 604a may be enforced only in state court; thus, a cause of action under this federal statute is not cognizable in federal court.

## III.

Accordingly, for the reasons stated in the district court's well-considered opinion and the additional reasons provided herein, we **AFFIRM** the district court's grant of summary judgment in favor of the FIA.

389 F.Supp.2d 827

United States District Court, W.D. Michigan, Southern Division.

**TEEN RANCH**, et al., Plaintiffs,

v.

Marianne UDOW, et al., Defendants.

**No. 5:04-CV-32.**

Sept. 29, 2005.

Gary S. McCaleb, Alliance Defense Fund, Scottsdale, AZ, Joel L. Oster, Alliance Defense Fund, Midwest Regional Service Ctr., Olathe, KS, Robert G. Fleming, E Lansing, MI, for Plaintiffs.

Erica Weiss Marsden, Joel D. McGormley, MI Dept Attorney General (Education/Social Services), Education & Social Services Division, Lansing, MI, for Defendants.

## *OPINION*

BELL, Chief Judge.

This action, which involves the provision of youth residential services by a faith-based organization under contract with the State, is before the Court on the parties' cross-motions for summary judgment. For the reasons that follow judgment will be entered in favor of the State Defendants.

## I.

Plaintiffs in this action are Teen Ranch, Matthew J. Koch, its Chief Executive Officer, and Mitchell E. Koster, its Chief Operating Officer (collectively referred to as "Teen Ranch"). Teen Ranch is a non-denominational Christian faith-based organization that has provided residential care for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966.

Defendants are Marianne Udow, Director of the Michigan Family Independence Agency ("FIA"), Musette A. Michael, Interim Director of the FIA, and Debora Buchanan, Manager of the Purchased Care Division of the FIA (collectively referred to as the "FIA" or the "State Defendants"). The FIA is a department of Michigan state government that is responsible for administering Michigan's public assistance, child and family welfare programs. M.C.L. § 400.1. The FIA is responsible for providing care and supervision to abused, neglected and delinquent children who have been committed to or placed in the care of the FIA through the state courts. M.C.L. §§ 400.114-400.115e. The FIA is authorized to place these children in out-of-home care and may contract with private organizations to provide these services. M.C.L. § 400.115(a); M.C.L. § 400.115a(1)(f).

Each year the FIA takes in approximately 3000 children for residential care. (Buchanan Dep. at 9). The FIA contracts with 96 private child care agencies to provide residential services to the youth for stays

averaging four to twelve months. At least 35 of the providers are faith-based organizations. (Buchanan Aff. ¶ 6). According to Buchanan, Teen Ranch is the only provider that incorporates its religious beliefs and teaching into the services funded under its contract with the FIA. (Buchanan Aff. ¶ 6).

When a child is made a state ward and placed with the FIA for care and supervision, the FIA does not offer the child a list of placement choices. Instead, the FIA places the child in one of its residential programs according to what the FIA believes is in the best interests of the child. The placement is determined by a computerized grid. The FIA obtains information about the child's history and treatment needs, inputs that information into the computer system, and the computer system finds the best matches between the youth's needs and the services provided by the various programs. Generally, the FIA places the child at the agency that has the best treatment match. If two facilities are equal, then the FIA will place the child at the agency that has waited the longest for a placement. (Slottke Dep. at pp. 5-35). Juvenile wards of the state receive assistance from a caseworker, a lawyer/guardian ad litem and parents or a guardian. (Buchanan Dep. at 112-119; Udow Dep. at 25-26).

The FIA's last contract extension with Teen Ranch expired on October 1, 2003. In November 2003, after an investigation of the Teen Ranch program, the FIA issued a moratorium against further placements at Teen Ranch. The FIA had a number of initial

concerns, but the incorporation of religious practices into the programming at Teen Ranch emerged as the FIA's primary concern.

In December 2003, Teen Ranch addressed FIA's concerns regarding its religious practices as follows:

> The mission statement of Teen Ranch states, "*providing hope to young people and families through life changing relationships and experiences from a Christian perspective.*" This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

(Amendment of Corrective Action Plan, Def. Ex. EE at 8) (emphasis in original).

Although there are many disputed facts concerning the specific manner in which religion is incorporated into the Teen Ranch program, Teen Ranch acknowledges that it is overtly and unapologetically a Christian facility with a Christian worldview that hopes to touch and improve the lives of the youth it serves by encouraging their conversion to faith in Christ, or assisting them in deepening their pre-existing Christian faith. (Policy Directive at 6, Def. Ex. DD). Teen Ranch expresses its religious beliefs through voluntary prayer, devotions, church attendance and faith discussions. (Pl. Statement of Undisputed Facts ¶ 5).

By letter dated January 9, 2004, the FIA informed Teen Ranch that while it was supportive of faith-based organizations, "[t]he incorporation of faith specific tenets into treatment is not permitted by state and federal law," and that "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium." (Def.Ex. B).

Teen Ranch independently adopted a procedure that required wards to be informed of the religious nature of Teen Ranch prior to being placed there, and giving the ward an opportunity to object to a Teen Ranch placement both before and after the actual placement. Although the FIA did place a few youth at Teen Ranch after it announced the moratorium in December 2003, the FIA reinstated the full moratorium

against placements at Teen Ranch after this Court denied Teen Ranch's motion for preliminary injunction.

Because most of Teen Ranch's residents were state placements, the moratorium has had a profound financial effect on Teen Ranch. Since the moratorium was entered Teen Ranch has had to close several of its programs and to sell half of its residential facilities. (Pl. Br. in Supp. of S.J. at 1).

Teen Ranch filed this action asserting four constitutional claims – violation of free exercise, free speech, due process, and equal protection, and one statutory claim – violation of the right to free exercise under 42 U.S.C. § 604a. This Court previously denied Teen Ranch's motion for a preliminary injunction. This matter is currently before the Court on the parties' cross-motions for summary judgment.

## II.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If the moving party carries its burden of showing there is an absence of evidence to support a

claim then the non-moving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. 2505.

## III.

Although a variety of legal theories and factual issues have been raised in the course of this litigation, this case is, at its heart, about the tension between the Free Exercise Clause and the Establishment Clause of the First Amendment.[1] These two clauses are frequently in tension. *See Locke v. Davey,* 540 U.S. 712, 718-19, 124 S.Ct. 1307, 158 L.Ed.2d 1

---

[1] The First Amendment provides in part that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amend. 1. The Establishment and Free Exercise Clauses have been made applicable to the States by incorporation into the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

(2004). Teen Ranch wants to be free to exercise its religious faith without interference from the State, and the FIA wants to avoid violating the Establishment Clause by subsidizing a particular religious viewpoint.

The Supreme Court articulated a test for determining when state funding violates the Establishment Clause in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and refined the test in *Agostini v. Felton,* 521 U.S. 203, 221-23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Under the resulting *Lemon/Agostini* test, the Court must consider whether the funding has "the purpose of advancing or inhibiting religion" and whether the funding has "the effect of advancing or inhibiting religion." *DeStefano v. Emergency Housing Group, Inc.,* 247 F.3d 397, 406 (2nd Cir.2001) (quoting *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 2559, 147 L.Ed.2d 660 (2000) (O'Connor, J., concurring in the judgment)). To answer the second question of effect, the court must consider whether the funding results in "governmental indoctrination," whether it defines its participants by reference to religion, and whether it creates excessive government entanglement with religion. *Id. See also Freedom from Religion Foundation, Inc. v. McCallum,* 179 F.Supp.2d 950, 966 (W.D.Wis.2002), *on reconsideration in part,* 214 F.Supp.2d 905 (W.D.Wis.2002), *aff'd,* 324 F.3d 880 (7th Cir.2003). "These same factors can in most situations be evaluated to answer what is often thought to be a separate question, whether a

practice amounts to an unconstitutional government 'endorsement' of religion." *DeStefano,* 247 F.3d at 406.

The tension in this case between the Establishment Clause and the Free Exercise Clause is focused by § 220 of the State appropriations bill, 2004 P.A. 344 (the "Public Act"), that governs the FIA's contracts with faith-based organizations.[2] Section 220 has been a part of every FIA appropriations bill since 2001. *See, e.g.,* 2003 P.A. 172 § 220. Section 220 provides that "the department shall ensure that **no funds provided directly** to institutions or organizations to provide services and administer programs **shall be used or expended for any sectarian activity**, including sectarian worship, instruction, or proselytization." 2004 P.A. 344, § 220(1) (emphasis added). If an individual who receives services from the FIA objects to the religious character of the organization providing services, the FIA will provide services from an alternative provider. *Id.* at § 220(2). "The department **shall not disqualify** faith-based organizations **solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.**" *Id.* at § 220(3) (emphasis added). Finally, the FIA is required to

[2] Defendants' contention that Plaintiffs did not allege a violation of § 220 of the Public Act is addressed in the discussion of Count V in Section VIII of this Opinion. The Court analyzes § 220 of the Public Act here, not as a separate claim for relief, but as the factual and legal background that forms the foundation for the parties' constitutional claims.

follow the guidelines related to faith-based involvement found in 42 U.S.C. § 604a.[3]

The federal statute referenced in § 220(4) is the charitable choice section of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

---

[3] The full text of § 220 reads as follows:

(1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, 42 USC § 604a.

Public Act 334 (2004).

("PRWORA"), 42 U.S.C. § 604a. The guidelines in § 604a are very similar to the provisions of § 220. The federal law expressly prohibits direct funding of sectarian worship, instruction, or proselytization;[4] requires the state to provide alternative services if the recipient objects to the religious character of the organization;[5] prohibits the state from discriminating against a religious organization on the basis of its religious character so long as the programs are implemented consistent with the Establishment

---

[4] Section 604a(j) provides:

> No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytization.

42 U.S.C. § 604a(j).

[5] Section 604a(e)(1) provides:

> If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

42 U.S.C. § 604a(e)(1).

Clause;[6] and enables the organization to retain its religious character.[7]

The Public Act, together with 42 U.S.C. § 604a, have changed some of the rules regarding public funding of religious organizations:

> Although religious organizations have been eligible to receive government aid under certain government programs for many years,

---

[6] 42 U.S.C. § 604a(c) provides:

> In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

[7] 42 U.S.C. § 604a(d)(1) provides:

> A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

> charitable choice is unique in that it does not require participating faith-based organizations to "secularize" themselves as a condition to receiving public funds. To the contrary, the charitable choice statute allows publicly funded religious organizations to retain their religious character and to employ their religious faith in carrying out secular social service programs, as long as the programs are administered in conformance with the establishment clause of the First Amendment.

*McCallum,* 179 F.Supp.2d at 982.

Both § 220 of the Public Act and 42 U.S.C. § 604a make important distinctions based upon whether funds are provided "directly" to the faith-based organization. Counsel for Teen Ranch candidly acknowledged to this Court during oral argument that if its program is directly funded by the State, then the State could not fund its program without violating the Establishment Clause and the Public Act. If, however, the funding is "indirect," then the State is not permitted under the Public Act to condition funding on the elimination of Teen Ranch's religious practices.

The State contends that its funding of Teen Ranch is direct because it contracts with and pays the funds directly to Teen Ranch. (Def. Br in Reply at 4-5). Contrary to the State Defendants' assertions, it appears that most courts would agree that funding is not "direct" simply because it is paid directly from the State to the faith-based organization rather than by

the individual through a voucher, coupon or certificate. The plurality of the Supreme Court noted in *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), that although previous cases had emphasized the distinction between direct and indirect aid, more recent cases have addressed the purpose of preventing subsidization of religion by focusing on the principle of "private choice." *Id.* at 815-16, 120 S.Ct. 2530 (Thomas, J., plurality). "Although the presence of private choice is easier to see when the aid literally passes though the hands of individuals . . . there is no reason why the Establishment Clause requires such form." *Id.* at 816, 120 S.Ct. 2530. *See also McCallum,* 324 F.3d at 882 ("so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers."); *McCallum,* 179 F.Supp.2d at 970 ("A plurality of the Supreme Court has held that as long as the individual selects the publicly funded program freely, thus making the funding truly indirect, it is irrelevant whether the funding passes through the hands of the individual first or goes directly to the selected program.").

The Supreme Court has repeatedly upheld programs against Establishment Clause challenges where the state funding of the programs arose out of "true private choice" or the "genuine and independent

choices of private individuals." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (citing *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993)). "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke,* 540 U.S. at 719, 124 S.Ct. 1307. "[W]hen public funding flows to faith-based organizations solely as a result of the 'genuinely independent and private choices of individuals,' the funding is considered indirect." *McCallum,* 179 F.Supp.2d at 970 (citing *Agostini v. Felton,* 521 U.S. 203, 226, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). "When a program receives indirect funding, it is the individual participant, and not the state, who chooses to support the religious organization, reducing the likelihood that the public funding has the primary effect of advancing religion in violation of the establishment clause." *Id.*

It is evident from these cases that the critical feature distinguishing direct funding from indirect funding is whether the individual has selected the program through true private choice. The Establishment Clause is not violated if the state money goes to a religious organization only as a result of the genuinely independent and private choices of an individual. In other words, private choice transforms constitutionally

troublesome "direct" funding into constitutionally unobjectionable "indirect" funding.

Although many issues have been raised by the parties, they all boil down to the single issue of whether the ability of youth to opt out of the Teen Ranch program pursuant to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct.[8]

The FIA points out that the ward does not get to choose where he is placed. Both the initial and the ultimate placement decision lies with the state. The FIA also contends that state wards are too young, vulnerable, and traumatized to be able to make the ability to opt out of a religious placement an exercise of true private choice.

Teen Ranch contends that the wards have the private choice on whether to attend Teen Ranch, a choice that is protected by state and federal statutes. Teen Ranch also rejects the State's assertion that the wards are too vulnerable to make a choice because

---

[8] After the initiation of the moratorium, Teen Ranch adopted a procedure that required wards to be informed of the religious nature of Teen Ranch prior to being placed at Teen Ranch, and provided the ward an opportunity to refuse placement at Teen Ranch. Although Teen Ranch's proposed procedure is laudable, this Court will focus on the requirements of the Public Act, rather than assuming that the State must or will follow the procedures outlined by Teen Ranch.

there is no evidence that wards are particularly shy, retiring, or too fearful to reject placement at Teen Ranch or to demand relocation if they form an objection to the religious programming there, and because each ward has a caseworker, a lawyer/guardian ad litem, and a parent or guardian to assist them in voicing and protecting their interests.

Regardless of whether state wards are particularly vulnerable, they are children. The Court believes that this fact cannot be ignored as the Court considers whether an opt-out provision is sufficient to make the ward's choice "a true private choice."

All of the cases where the issue of private choice has been held sufficient to avoid Establishment Clause concerns have involved a variety of options. For example, in *McCallum* criminal parolees were offered enrollment in one of several private halfway houses under contract with the state as an alternative to being sent back to prison. The plaintiffs challenged the state's funding of Faith Works, Milwaukee, Inc., a faith-based, long-term alcohol and other drug addiction treatment program, that incorporated Christianity into its treatment program. The district court found that "offenders participate in Faith Works as a result of genuinely independent, private choice and that this choice makes the Department of Corrections contract with Faith Works an indirect program that does not convey a message of endorsement." *McCallum,* 214 F.Supp.2d at 905. The district court accordingly concluded that funding of Faith Works by the Department of Corrections did not violate the

Establishment Clause. *Id.* at 907-08. Even though *McCallum* dealt with adult offenders who had a clear choice between a religious program and a variety of secular programs, the district court still found that it was a close question. 214 F.Supp.2d at 907. In affirming, the Seventh Circuit noted that the state was eager to have Faith Works on its "menu of halfway-house choices." *McCallum,* 324 F.3d at 883. The court observed that most private schools in this country are parochial schools, and that accordingly, the fact that "most of the halfway houses with which the state has contracts are secular makes this an easier case than the school voucher case." *Id.*

The issue of true private choice was discussed most recently in *American Jewish Congress v. Corporation for National and Community Service,* 399 F.3d 351 (D.C.Cir.2005). In that case the court held that providing education awards to AmeriCorps participants who taught in religious schools did not violate the Establishment Clause. In arriving at this determination the court noted that there were "numerous" teaching positions in public and private secular schools and that no participant who wanted to teach in a secular school was impermissibly channeled to a religious school. *Id.* at 358. "When enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice." *Id.*

In this case the wards of the State are not presented with any alternatives. They are presented with one placement by the State and they have the

ability to opt out of that placement if they object to the religious nature of the program. In that event the State will place the child in an alternative program. Although the children have the ability to opt out of a religious program, they do not have the ability to choose or reject a religious program from a menu of secular and religious programs.

The Court is aware of no case that has examined the issue of whether an opt-out provision is sufficient to constitute "true private choice." There are no cases regarding the sufficiency of an adult's ability to opt out, much less a case about children. The Court is mindful that more care must be taken when it is dealing with children. In finding private, independent choice and a lack of state endorsement of religion in *McCallum,* the district court distinguished the adult offenders who chose to participate in the Faith Works program from children who might be more impressionable or susceptible to indoctrination. 214 F.Supp.2d at 915-16, 919 (citing *School Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)) (Goldberg, J., concurring).

Although the Court is hesitant to suggest whether an opt-out program will ever satisfy the true choice required to avoid Establishment Clause problems, the Court is satisfied that where, as here, the State selects the juvenile state ward's residential placement, the ward's ability to opt out of placement at a faith-based institution with religious programming is not sufficient to avoid Establishment Clause problems because State placements at Teen Ranch

would advance or endorse a particular religious viewpoint.

Up to this point the Court has been focusing on the choice to opt out of the Teen Ranch program. In the early stages of this case there was significant discussion as to whether participation in religious activities at Teen Ranch was voluntary. The State contended that Teen Ranch coerced wards to participate in religious activities. Teen Ranch denied the accusation and asserted that all participation in religious activities was voluntary because residents had the option of not participating in prayer, devotions, and church, and no negative consequences attached to their non-participation in these religious activities.

It appears that voluntary participation in the day-to-day religious activities at Teen Ranch is no longer the focus of the parties' dispute. Nevertheless, because Teen Ranch continues to emphasize that the youth in its program have the option of not participating in prayers before meals, devotions during the week, church attendance, or discussions concerning Christian faith, the Court feels constrained to consider whether the ability to opt out of participation in religious activities is sufficient to save the Teen Ranch program from Establishment Clause concerns. The Court concludes that it is not.

As the Supreme Court has repeatedly held in connection with the school prayer cases, the ability to

withdraw from religious activities does not make a program non-religious:

> Just as in *Engel v. Vitale,* 370 U.S., at 430, 82 S.Ct., at 1266, and *School Dist. of Abington v. Schempp,* 374 U.S., at 224-225, 83 S.Ct., at 1572-1573, where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

*Lee v. Weisman,* 505 U.S. 577, 596, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). As noted in *Lee v. Weisman,* "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592, 112 S.Ct. 2649.

> We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.

*Id.* at 593, 112 S.Ct. 2649. *See also Santa Fe Independent Sch. Dist. v. Doe,* 530 U.S. 290, 301, 120 S.Ct.

2266, 147 L.Ed.2d 295 (2000) (holding that school district's policy of permitting student-led, student-initiated prayer at football games violates the Establishment Clause).

In light of the Supreme Court's determination that a student's choice to stand quietly or to remove himself from prayers during graduation or football games will not withstand constitutional scrutiny in the public school setting, it is clear that the ability to choose not to participate in religious activities at Teen Ranch cannot pass constitutional scrutiny. The pressures that the Supreme Court recognized in the public school setting would inevitably be far greater in a long term residential program where the youth are separated from their parents, deprived of many personal freedoms, and under the daily supervision and influence of those who are leading the religious activities.

Nothing in this discussion should be construed as a challenge to the sincerity or the efficacy of Teen Ranch's faith-based program. The only issue is whether an opt-out provision for juvenile state wards assigned to Teen Ranch is true private choice. The Court holds that it is not. Because there is no "true private choice," the State cannot fund placements at Teen Ranch without running afoul of the Public Act and the Establishment Clause.

With this threshold determination that funding is not appropriate under § 220 of the Public Act or the

Establishment Clause, the Court will address the five claims alleged in Plaintiffs' complaint.

## IV.

Plaintiffs' first claim alleges a violation of the right to free exercise of religion under the First Amendment of the United States Constitution. Teen Ranch contends that the maintenance of the moratorium violates the Free Exercise Clause[9] because it conditions the receipt of a governmental benefit on Teen Ranch's surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff's religious beliefs without satisfying the strict scrutiny standard.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 876-77, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). It also prohibits the government from imposing "special disabilities on the basis of religious views or religious status." *Id.* at 877, 110 S.Ct. 1595. Thus, the Supreme Court held that conditioning the award of unemployment compensation benefits on the abandonment of conduct required by an individual's religion violates the Free Exercise Clause of the First Amendment. *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480

---

[9] *See* footnote 1, above.

U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See also McDaniel v. Paty*, 435 U.S. 618, 626, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (holding that a state constitutional provision barring ministers from holding legislative office violated the Free Exercise Clause).

The *Sherbert v. Verner* line of cases all held that the government could not deny a public benefit based on the workers' religious beliefs. Unlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit. The *Sherbert v. Verner* line of cases does not stand for the proposition that the State can be required under the Free Exercise Clause to contract with a religious organization.

More on point is the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), where the Court reviewed a state scholarship program that excluded any student who was pursuing a degree in devotional theology. *Id.* at 715, 124 S.Ct. 1307. Although the law was not facially neutral with respect to religion, the Court held that it did not violate the Free Exercise Clause:

> It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to

> choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

*Id. at* 720-21, 124 S.Ct. 1307 (citations omitted).

In *Gary S. v. Manchester School Dist.*, 374 F.3d 15 (1st Cir.2004), the First Circuit held that the failure to provide federal and state funding for certain special education services provided by private religious schools even though the same services were funded when provided by public schools, did not violate the Free Exercise rights of a disabled child or his parents. "[I]t is clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis." *Gary S. v. Manchester School Dist.* 374 F.3d 15, 21 (1st Cir.2004). "[T]he mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof." *Id.* at 21-22.

Subsequently, the First Circuit addressed the issue of whether a Maine statute providing that only nonsectarian schools were eligible to receive public funds for tuition violated the Free Exercise Clause or Equal Protection. The court held that it did not: "*Davey* confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to

fund the secular equivalents of such activity." *Eulitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 354 (1st Cir.2004).

There is no question that in the absence of the non-discrimination provisions of the Public Act the State's failure to contract with a particular faith-based organization would not violate the organization's Free Exercise rights. Teen Ranch's Free Exercise claim accordingly depends on the State's violation of the Public Act. This Court has determined above that the FIA did not violate the Public Act. In light of this determination, the State Defendants are entitled to judgment on Plaintiffs' Free Exercise claim.

## V.

Plaintiffs' second claim alleges a violation of the Free Speech Clause of the First Amendment. Plaintiffs contend that FIA's assertion that it will not rescind the moratorium unless Teen Ranch modifies its current practices of imposing its religious beliefs into its treatment and service plan activities is blatant viewpoint discrimination. Plaintiffs cite *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), in support of its contention that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829, 115 S.Ct. 2510.

In *Rosenberger* the Supreme Court held that a university's denial of funds to an organization that published a newspaper with a Christian editorial viewpoint amounted to viewpoint discrimination in violation of the First Amendment. *Id.* at 832, 115 S.Ct. 2510. As noted in *Locke,* the unconstitutional viewpoint restriction discussed in *Rosenberger* is limited to cases involving speech in a public forum. *Locke,* 540 U.S. at 720 n. 3, 124 S.Ct. 1307. The *Locke* Court distinguished *Rosenberger* on the basis that the state scholarship program was not a forum for speech. The purpose of the program was to assist students with the cost of college education not to "encourage a diversity of views from private speakers." *Locke,* 124 S.Ct. at 1312 n. 3, 124 S.Ct. 1307 (quoting *United States v. Am. Library Ass'n,* 539 U.S. 194, 206, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003)). "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that Free Speech Clause was not violated by federal regulations prohibiting recipients of federal funding for family-planning services from engaging in abortion counseling or referral).

A free speech argument was similarly rejected in *McCallum* on the grounds that the government had not created a forum for speech. The district court held that Wisconsin's decision to contract with private entities to deliver drug and alcohol services did not create, encourage or otherwise facilitate private

expression, and accordingly the state could make a content-based selection of private sector providers without violating the First Amendment. 179 F.Supp.2d at 979-81.

Plaintiffs attempt to distinguish *Locke* and *McCallum* on the basis that 42 U.S.C. § 604a and the State Public Act explicitly give faith-based organizations such as Teen Ranch the right to express their religious beliefs, thus creating a forum for free speech. Plaintiffs suggest that in light of these statutes, this case is governed by *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

In *Velazquez* the Supreme Court held that an act prohibiting the use of funding from the Legal Services Corporation ("LSC") for legal challenges to existing welfare law violated the First Amendment. *Id.* at 536-37, 121 S.Ct. 1043. The Court noted that although the purpose of the LSC program was "not to 'encourage a diversity of views,' the salient point is that, like the program in *Rosenberger,* the LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542, 121 S.Ct. 1043. By restricting the legal arguments that could be made, the Act unconstitutionally infringed on the private speech of indigent litigants and their attorneys. *Id.* at 546-49, 121 S.Ct. 1043. Even in *Velazquez*, however, the Court reiterated that "viewpoint based funding decisions can be sustained in instances in which the government itself is the speaker, or in instances . . . in which the government

use[s] private speakers to transmit information pertaining to its own program." 531 U.S. at 541, 121 S.Ct. 1043.

The fact that FIA has decided to contract out some of its children's services responsibilities to private providers does not create a forum for private speech. The purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care. Unlike the LSC program discussed in *Velazquez*, the State Public Act is one of those instances in which the government uses private speakers to transmit information concerning the government's own program.

Moreover, even if the Court were to find that the Public Act created a limited forum for speech, that forum is limited to sectarian programs that are not directly funded, i.e., that are chosen by individuals as a matter of "true private choice." Because the Public Act specifically prohibits direct funding of any sectarian activity, it does not create a forum for speech when the participants do not have a true private choice on whether or not to participate in the program.

For all these reasons, the State Defendants are entitled to judgment on Plaintiffs' Free Speech claim.

## VI.

Plaintiffs' third claim alleges a violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs contend that the moratorium violates their due process rights because it is vague and fails to provide explicit standards. Plaintiffs contend there are no standards to guide the FIA in imposing a moratorium, and thus the Defendants' actions are unconstitutionally vague. *See Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *United Food & Comm'l Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.,* 163 F.3d 341, 358-59 (6th Cir.1998) ("Due process requires that we hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.").

Contrary to Plaintiffs' assertions, the FIA's determination to enter into a moratorium on further placements at Teen Ranch was not a matter of unbridled discretion. The Public Act contains standards that guide the FIA regarding contracts with faith-based organizations and restricts the FIA from directly funding sectarian activities. Those standards are not unconstitutionally vague. Accordingly, the State Defendants are entitled to judgment on Plaintiffs' due process claim.

## VII.

Plaintiffs' fourth claim alleges a violation of the Equal Protection Clause[10] of the Fourteenth Amendment. The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Teen Ranch contends that it is similarly situated to the other private placement facilities that contract with the State and offer similar services, some of which are secular and others which are faith-based.

The FIA has presented unrebutted evidence that it is aware of no other placement facility that incorporates its religious beliefs and teachings into the services funded under its contract with FIA, (Buchanan Dep. at ¶ 6), or that incorporates religion as an integral part of its residential program. Accordingly, it is not similarly situated to the other private placement facilities that contract with the state.

Even if it were similarly situated, under equal protection analysis strict scrutiny is only applied if there is an infringement of a fundamental right or discrimination against a suspect class. Under equal protection analysis, "[i]f a protected class or fundamental right is involved, this Court must apply strict

---

[10] The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV § 1.

scrutiny, but where no suspect class or fundamental right is implicated, this Court must apply rational basis review." *Midkiff v. Adams County Regional Water District,* 409 F.3d 758, 770 (6th Cir.2005) (citing *Hadix v. Johnson,* 230 F.3d 840, 843 (6th Cir.2000)).

Plaintiffs contend that the Defendants' discriminatory treatment is subject to strict scrutiny because the discriminatory policy infringes First Amendment rights. Because this Court has already determined that Plaintiffs do not have a meritorious Free Speech or Free Exercise claim, their Equal Protection claim is subject to rational basis scrutiny.

In *Eulitt* the First Circuit found that Maine's reasons for excluding religious schools from education plans that extend public funding to private schools for the provision of secular education to Maine students met the rational basis test. Those reasons included:

> concentrating limited state funds on its goal of providing secular education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities).

*Eulitt,* 386 F.3d at 356.

In this case the State Defendants' desire to avoid violating the Establishment Clause through direct funding of a program that incorporates specific religious teaching, worship, or proselytization, is sufficient to

meet the rational basis test. Accordingly, the State Defendants are entitled to judgment on Teen Ranch's Equal Protection claim.

## VIII.

Plaintiffs' fifth claim alleges a violation of Teen Ranch's statutory right to free exercise of religion. Teen Ranch alleges that the FIA's moratorium on placements at Teen Ranch violates their rights under 42 U.S.C. § 604a.

Defendants contend this Court lacks jurisdiction over any claim based on 42 U.S.C. § 604a because this statute does not create any private rights enforceable in federal court. The statute provides:

> Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

42 U.S.C. § 604a(i).

Moreover, by its terms, § 604a applies only to programs that are funded under Title IV-A of the Social Security Act and any other program established or modified under Title I or II of the Social Security Act. 42 U.S.C. § 604a(a)(1). FIA is funded for a portion of its foster care placement costs under Title IV-E of the Social Security Act, rather than Title IV-A.

Plaintiffs have not rebutted Defendants' argument that § 604a does not apply to its residential placement programs. Instead, they now claim that they have a cause of action under § 220 of the Public Act.

Plaintiffs did not clearly allege a violation of state law as a basis for relief in their complaint. In Count V Plaintiffs alleged that "42 U.S.C. § 604(a) (and state law applying § 604(a)) prohibit government entities from requiring faith-based providers to alter their religious practices or nature as a condition of receiving youth placed by FIA." (Compl. at 24, ¶ 1). "Therefore FIA's refusal to lift its unlawful moratorium on new placements at Teen Ranch violates the statutory right to its religious nature and practices protected by 42 U.S.C. § 604(a)." (Compl. at 24, ¶ 5).

The only reference to the state law is found in the parenthetical in paragraph 1 of Count V. This parenthetical reference is not sufficient to place the State on notice that it is being sued for a violation of State law. Moreover, to the extent Plaintiffs are suing for prospective injunctive relief, their claims are against the State Defendants in their official capacities and are governed by the Eleventh Amendment. This Court cannot consider a claim for injunctive relief for violation of § 220 of the Public Act because the Eleventh Amendment prohibits federal courts from enjoining state officials for violations of state law. *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). *See also Freeman*

*v. Michigan Dept. of State,* 808 F.2d 1174, 1179-80 (6th Cir.1987).

Even if a state law claim for damages had been properly pled, the Court declines to exercise supplement jurisdiction over the damages claim because the Court has dismissed all of the federal claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). *See also Musson Theatrical, Inc. v. Federal Express Corp.,* 89 F.3d 1244, 1254-55 (6th Cir.1996) (noting that when all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims).

## IX.

All of Plaintiffs' claims are rooted in their assertion that any youth who go to Teen Ranch are there as a matter of private choice, that there is accordingly no direct funding of Teen Ranch's religious practices by the State, and that the State is accordingly prohibited by the Public Act from conditioning its funding of Teen Ranch on the modification or elimination of Teen Ranch's practice and expression of its religious beliefs. Because this Court has determined that the ability to opt out of placement at Teen Ranch is not sufficient to constitute private choice, the Court concludes that the State is entitled to a judgment that its moratorium against further placements at Teen Ranch does not violate any of Teen Ranch's constitutional rights. The Court will accordingly grant the State Defendants' motion for summary

judgment, deny Teen Ranch's cross-motion for summary judgment, and enter a judgment in favor of the State Defendants.

An order and judgment consistent with this opinion will be entered.

***ORDER***

In accordance with the opinion entered this date,

**IT IS HEREBY ORDERED** that Defendants' motion for summary judgment (Docket # 70) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's motion for summary judgment (Docket # 72) is **DENIED**.

**IT IS FURTHER ORDERED** that **JUDGMENT** is entered in favor of Defendants and Plaintiffs' complaint is **DISMISSED** in its entirety.

---

No. 05-2371

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TEEN RANCH, INC., ET AL.,

Plaintiffs-Appellants,

v.

MARIANNE UDOW, ET AL.,

Defendants-Appellees.

ORDER

(Filed Jun. 15, 2007)

**BEFORE:** KEITH and COLE, Circuit Judges; and STEEH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**/s/ Leonard Green**
**Leonard Green, Clerk**

[Omitted In Printing]

[LOGO] Alliance Defense Fund.

January 21, 2004
*Via Facsimile and Federal Express*

Debora Buchanan, Manager
Purchased Care Division
Family Independence Agency
236 South Grand Avenue
Lansing, Michigan 48909

**Re: Teen Ranch, Inc. – moratorium on placements**

Dear Ms. Buchanan:

I represent Teen Ranch, Inc. and write today in response to your letter of January 9, 2004 to Teen Ranch Chief Executive Officer Matt Koch. The purpose of this letter is to assure you that the moratorium on new placements with Teen Ranch may – indeed, must – be promptly lifted.

By way of introduction, the Alliance Defense Fund is a national non-profit public interest law and educational organization that defends religious liberty. We seek to resolve disputes through education of public officials about the constitutional rights of organizations such as Teen Ranch. When necessary, we may litigate to secure those rights.

Certainly, a swift, informal resolution offers benefits to both Teen Ranch and the Family Independence Agency ("FIA"). On one hand, Teen Ranch is suffering serious economic impact and disruption of

its daily routines due to the moratorium. Meanwhile, FIA is deprived of one of its historically most effective providers, further complicating its challenging mission. Most importantly, children who would benefit from the love, care, and proven techniques of Teen Ranch are being denied what is perhaps their best chance for a productive, happy future.

Below I summarize the facts that have led to this impasse, discuss the matter, and recommend a solution.

## BACKGROUND

Teen Ranch, Inc. has provided fully licensed, state-approved placement facilities for delinquent, neglected, abused, and emotionally troubled youth since 1966. Its mission is clear: "Providing hope to young people and families through life changing relationships and experiences from a Christian perspective." Its success is equally clear; it has enjoyed a remarkably low historical recidivism rate, and anecdotal evidence confirms the statistics. Simply put, a troubled teen is very likely to find a better future through Teen Ranch.

In October, 2003, FIA personnel conducted a routine "Quality Assurance Review" which included a site visit to Teen Ranch facilities that was documented in the December 2, 2003 "Quality Assurance Program Review Report ("QAP Report"). This rigorous inspection identified a handful of minor discrepancies, most of which were resolved after Teen Ranch

prepared its December 17, 2003 "Corrective Action Plan" ("Dec. 17 CAP"). The December 17, 2003 CAP was slightly amended on or about December 29, 2003 ("Dec. 29 CAP"), to further clarify a few responses and ensure that FIA's concerns were fully met. As amended, the CAP would resolve every operational issue raised by FIA, except one.

The remaining issue, according to your January 9, 2004 letter, is that "information suggest[s] that Teen Ranch may be . . . improperly incorporating religious teaching into the daily activities and treatment plans of youth." Thus, relying upon the suggestion of a possibility that religion is misused at Teen Ranch, FIA has refused to lift the moratorium lest the so-called "wall of separation" between church and state be breached.

## DISCUSSION

Lifting the moratorium immediately is appropriate because (I) several of the factual allegations attributed to unnamed, troubled adolescents are addressed by existing Teen Ranch policies; (II) even assuming that there is a legitimate Establishment Clause concern, it would be resolved if FIA discharged its statutory duty pursuant to Michigan Public Act 172 § 220(2); and (III) perpetuating the moratorium would violate, *inter alia*, the First Amendment to the United States Constitution. I address each issue below.

## I. SEVERAL FACTUAL ALLEGATIONS ARE ADDRESSED BY LONGSTANDING TEEN RANCH POLICY.

Several of the allegations made against Teen Ranch are issues that are properly resolved under existing Teen Ranch policies. We respectfully note that these allegations are singularly vague – there are no specifics as to which youth were purportedly required to participate in religious exercises, which staff persons were involved, when the situations happened, or where the events occurred. In most instances, the vague allegations prevent Teen Ranch from conducting its own review to determine whether its policies were violated and taking corrective action. Basing a moratorium upon such vague allegations suggests an intent to harm Teen Ranch, rather than resolve any legitimate concerns involving the youth.

We turn now to the first allegations raised in your January 9, 2004 letter.

- **Allegation**: "Seven youths reported being required to participate in religious services."

  - **Response**: Teen Ranch, as a matter of policy, does not require residents to participate in religious services: *See* Dec. 17 CAP at 8 ("Teen Ranch, as policy, does not 'force' youth to attend religious services. . . . "). Note that FIA's own review rebuts this allegation. *See* QAP Report at 12 ¶ H (youth – who first complained he had "no choice" but to attend Sunday religious services – later admitted

that "youth who don't want to go are dropped off at another house.").

- **Allegation**: Three youths reported that they would "lose points" if they did not attend and participate in church services.

  - **Response**: Teen Ranch's point system offers rewards to the youth based upon the youth's attitude and behavior each day, whether in class, working, studying, or if the youth so chooses, while at church. In other words, there is no "church exception" to the point system, whereby a youth could earn points for good behavior in school, but misbehave in church without suffering some consequence. However, points are *not* awarded as a result of the youth choosing to (or not to) attend church. *See* Tab A (2002 points policy ¶6) (points awarded for behavior in social situations *or* work/chores *or* church); Tab B (2003 point policy) (describing categories more generally).

- **Allegation**: One youth reported that she was placed "out of program" and required to do "criteria" because she did not participate in religious services.

  - **Response**: As stated above Teen Ranch does not require participation in religious services, and does not punish youth who do not participate in religious services. As with each of these complaints, further evaluation is impossible without some specifics being offered.

- **Allegation**: A female ward allegedly complained that she had been forced to attend church, where "they spoke in tongues and touch you on the forehead:"

  - **Response**: As stated above, Teen Ranch does not require youth to attend church services. We are informed that the girl was not taken to the church in question against her will, nor was she compelled to present herself to the minister. In short, according to our information, nothing involuntary occurred. This is in keeping with Teen Ranch's clear policy, as well as FIA's own report confirming that youth may choose to not attend church. If they do choose to attend church, they have a choice of religious facilities – including even the transport of an Islamic youth to worship at a mosque. Teen Ranch maintains transport records and can document its practices. Finally, even assuming that the girl found the particular mode of worship objectionable, her remedy was to choose another church or simply not go – not to have the state impose a moratorium on further referrals.

In each of these instances, FIA has relied upon the word of troubled youth over the plainly stated policies of Teen Ranch. We do not suggest that youths' complaints should not be taken seriously. Rather, FIA should obtain verifiable details and give sufficient information to allow Teen Ranch to discern and correct any lapses in its procedures. Put another way, the allegations (at most) may merit an internal

review by Teen Ranch. *They certainly do not support a state-imposed, religiously discriminatory moratorium upon the organization.*

## II. ESTABLISHMENT CLAUSE CONCERNS ARE READILY RESOLVED IF FIA DISCHARGES ITS STATUTORY DUTY UNDER STATE AND FEDERAL LAW.

The remaining allegations flow from "The River," which is one program used at Teen Ranch to help youth overcome the daunting difficulties in their lives. According to FIA, this River breaches the so-called "separation of church and state" because it has religious content and is used as part of Teen Ranch's treatment plans. This concern is driven less by facts and more by misreading the law.

### A. THE REMAINING FACTUAL ISSUE IS IRRELEVANT.

The only factual issue was that one girl complained that she was required to attend the program – but not because it offended her religious sensibilities. Rather, she complained that The River "was geared toward girls that had been sexually abused and since she wasn't, she didn't think it was necessary for her to attend." QAP Report at 12 ¶ H. Her only other comment was that the program directors would not excuse girls during the program to use the bathroom – although they were warned of this and given time to do so beforehand. *Id.* This complaint

has nothing whatsoever to do with Teen Ranch's policies regarding religion, and certainly does not implicate the Establishment Clause. Rather, it pertains to her course of treatment, which cannot be evaluated because FIA did not provide specifics that would allow Teen Ranch to evaluate whether The River was appropriate for the complaining youth. If FIA will provide that information, her treatment plan will be reviewed and any appropriate adjustments will be made.

### B. THE LAW PROHIBITS ONLY DIRECT STATE FUNDING OF RELIGIOUS ACTIVITIES, NOT THE ACTIVITIES THEMSELVES.

FIA summarizes the relevant law by saying that "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities." In support of this position, FIA cites Michigan Public Act 172 § 220(1):

> In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, *the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.*

*Id.* (emphasis added).

There is a basic error with FIA's reading of the law: what the statute prohibits is direct *state funding* of the specified religious activities, not the religious activities themselves. In our case, The River is planned and implemented by a privately-paid staff chaplain and is not directly supported by any state funds.

Not only has FIA misread the relevant law, it completely ignored the next subsection of P.A. 172:

> If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

*Id.* § 202(2); *see also* 42 U.S.C. 604a(e) (same statutory obligation for state agencies receiving federal TANF funds).

Simply put, state law protects the youth who are processed through FIA from exposure to unwanted religious content by requiring *your* agency to respond to such objections with alternative, non-objectionable options. Therefore, *if* any of the thin allegations cited by FIA had any merit whatsoever, it was (and is) FIA's statutory duty to provide options. Teen Ranch is perfectly willing to fully cooperate in relocating any objecting youth who might seek relocation under

§ 202(2). The law certainly does not demand that Teen Ranch secularize itself and its programs as a condition of equal access to government funds.

Recent case law affirms this understanding. *See Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). The facts in our case strongly parallel those of *McCallum*. In both cases, the prospective residents are under state control; the state evaluates the prospective resident and decides which program best suits the person's needs; and the state directs the person to a private program under contract to the state. Importantly. both cases involve faith-based providers that include significant religious components in their treatment. The only significant difference is that in *McCallum*, the state ensured that objectors were offered an alternative. In our case, FIA has not discharged that legal duty.

The proper resolution of this matter should now be clear: FIA should promptly implement an "opt out" process for youth that it directs to residential care facilities. Teen Ranch would readily support FIA's effort by ensuring that the program descriptions are accurate, and establishing a procedure to report objections from youth who change their minds after beginning the Teen Ranch program.

Just as the current moratorium has had very serious effects on FIA, Teen Ranch, and the many youth that could have been served by Teen Ranch, so this solution would offer many benefits: FIA would regain one of its best contractors and be assured that

its process is constitutional under Establishment Clause law; Teen Ranch could resume its service to the state; and the youth who so desperately need Teen Ranch's wisdom and love could receive it.

## III. PERPETUATING THE MORATORIUM PLACES FIA IN AN UTTERLY UNTENABLE LEGAL POSITION.

For some three decades, the Ranch has received state funds under religion-neutral criteria, without any Establishment Clause issues arising. FIA's moratorium, on the other hand, targets religion for disfavored treatment and violates a multitude of constitutional principles. The question created by the moratorium is whether the government may single out and discriminate against a religious program in the course of distributing government thuds to serve its valid, secular public interests. Under statutory and well-settled case law, the answer is "no."

First, express discrimination against religious speech and practice violates the basic free exercise rule set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Fialeah*, 508 U.S. 520 (1993). If a law "infringe[s] upon or restricts practices because of their religious motivation," the law is valid only if it is narrowly tailored to advance a compelling state interest. *Id.* at 533. As well, conditioning benefits in this way violates the rule in *McDaniel v. Paty*, 435 U.S. 618 (1975). Free speech rights under the First Amendment are also violated, because the funds

constitute a type of free speech forum. Barring Teen Ranch's participation, solely because it treats youth from its Christian perspective, is viewpoint discrimination that is blatantly unconstitutional under *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and its progeny. This doctrine is implicitly recognized in 42 U.S.C. §§ 604a(b)-(d), which prohibits state agencies from tinkering with the religious nature of faith-based organizations.

The religious restriction also violates the Equal Protection Clause, because all other care providers have full access to state funding, while a religiously motivated program is denied funding for one reason: its religious nature. Similarly, the moratorium was imposed apparently by the exercise of raw, unbridled official discretion. This violates the federal Due Process Cause, which proscribes *ad hoc* enforcement of government regulations.

As demonstrated by *McCallum*, the Establishment Clause concern is without merit and would not justify FIA's continued religious discrimination. Nor does it matter that the state constitution contains an "Establishment Clause" provision. Rather, Teen Ranch's federal constitutional claims would, as a matter of law, prevail over any state Establishment Clause concerns in this instance. *See* U.S. Const. art. VI, cl.2 (Supremacy Clause); *see also, Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Note, too, that state free exercise and establishment claims are interpreted in the same way as federal law. *See*

*generally, Daugh[illegible] v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897 (W.D. Mich. 2000). Thus, FIA may not take refuge in some supposed "higher wall" of separation arising from state law theories.

Simply put, FIA's imposition of the moratorium discriminates on the basis of the religious nature and beliefs of Teen Ranch, and leaves your agency in a very precarious legal situation. The moratorium is a draconian response to minor operational issues, and completely fails to redress the real problem: FIA's failure to provide the proper opt-out procedure.

## CONCLUSION

In light of the above, it is appropriate (if not imperative) that the moratorium be promptly rescinded, and it is our strong hope that this letter may attain that result in an informal, cooperative manner. Similarly, in light of the state and federal law regulating the relevant funds, FIA must provide an "opt out" procedure. Again, Teen Ranch will lend its expertise and cooperation in developing that procedure so that every youth coming to the ranch does so via a fully informed private decision. Taking such action would fully resolve any legitimate Establishment Clause concerns in this case.

At the same time, if FIA has additional information which suggests that there was any lapse in the application of Teen Ranch's policies, Teen Ranch will promptly act on that information when it is provided, remedy the problem, and document it via a CAP.

Such a resolution is far preferable to litigation. Nonetheless, if informal resolution cannot be achieved, I am obligated to inform Teen Ranch of its right to seek redress in federal court.

It is of the utmost import that the moratorium be promptly rescinded. Please advise me of your position in this matter no later than January 30, 2004.

Of course, please feel free to contact me if I may assist in informally resolving this matter.

Sincerely,

/s/ Gary S. McCaleb
Gary S. McCaleb
Senior Counsel

cc: Fax only, w/o attachments:
Marianne Udow, Director FIA
Elias Vasquez
Musette Michael, Esq.
Hard copy, w/attachments:
Mark Bucchi, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

---

TEEN RANCH, INC., et al., CASE NO. 504-CV-0032

Plaintiffs, HON. ROBERT HOLMES BELL

vs.

MARIANNE UDOW, et al.,

---

DEPOSITION OF:
DEBORA BUCHANAN
December 10, 2004
235 South Grand
Lansing, Michigan

Appearances – JOEL L. OSTER, ESQ.
and
MARK P. BUCCHI, P-32047
Attorneys for Plaintiffs
JOEL D. McGORMLEY, P-60211
Assistant Attorney General
Attorney for Defendants

Also Present – Matthew Koch
Mitchell Koster

Recorded by: – NETWORK REPORTING CORPORATION
Rebecca A. Alexander, CER-4233

* * *

[74] MR. McGORMLEY: Same objection; calls for a legal conclusion.

A Well, I recognize that the first sentence says: "The department shall follow guidelines." I don't know what those guidelines are. I don't have them in front of me. I don't know that we're not following those guidelines. I don't know that one – section 1 trumps section 4 or vice versa.

Q All right. Before we break for lunch, I want to be absolutely clear that I understand that – if I correctly understand your testimony that your concern then and now is that money go from the State to Teen Ranch to pay for any of the religious programming regardless of whether or not that programming is voluntarily participated in by the wards?

A My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera, into their daily treatment and ongoing care for youth.

Q And my – the gist of my question, though, was is that your position regardless of whether or not the wards are participating voluntarily?

A If FIA is funding those positions and if FIA state and federal dollars are going towards that, then, yes, I agree that having it incorporated into treatment and ongoing [75] activities would be improper.

Q And I want to get down to the precise point that I'm trying to be clear on with you. Does your

answer stay the same whether or not the youth that are participating are doing so voluntarily?

A My position would be the same whether they're voluntary or not if state and federal dollars are being used for –

MR. BUCCHI: Let's have lunch, and we'll see you in an hour. That was the pre-agreed time, and we got awful close to it.

MR. McGORMLEY: Sure. Do you want to go 1:10?

MR. BUCCHI: Absolutely. And as you well know, Counsel, as a man of experience, 1:10 is going to be a very flexible concept.

(Off the record)

Q Ms. Buchanan, you've indicated that in the course of your involvement in this matter, you consulted with any number of your colleagues at the FIA; correct?

A Yes, sir.

Q Would that include Musette Michael?

A Yes, sir.

Q And would it include Mrs. Udow?

A I have not spoken with Mrs. Udow regarding this matter.

Q Okay. What about Ms. Slottke?

A I'm sure I had conversations with Carol Slottke regarding [76] the Teen Ranch and the moratorium. I did not consult with her regarding the letters that I wrote or any of those things.

Q You expressed the opinion just before we broke for lunch that regardless of the voluntary nature of the participation of the wards that if religion was being dispensed as a part of the program, then that would be objectionable; right?

A I can't remember exactly what I said, but this is what I think is that it is both the – it is both the inclusion of religious teachings, practices, et cetera, and treatment planning and ongoing daily activities, and if there were a situation where kids were being forced to participate, that would be equally of concern.

Q But whether or not the children were being forced, it was of concern. That's what you said just before lunch; right?

A Yes.

Q Okay. Did anybody that you spoke to at the FIA since last November of 2003 disagree with you in this respect?

A No. I don't – if anybody disagreed, I don't recall it.

Q Now, to your knowledge, what form of religious content was being dispensed to the wards of Teen Ranch to which you objected?

A To my knowledge, what was being dispensed was Christian teaching to youth in the course of their daily activities [77] and in the course of providing treatment to the youth such as –

Q Give me an example.

A – The River.

Q What about – what was happening at The River to which you objected?

A Based on reviewing the statement made by a youth in the questionnaires that you have as well as reviewing information that was provided or available from Teen Ranch, it appeared to me that The River was designed to promote, encourage youth to participate in Christian teachings.

Q Did it every come to your attention that any of these youth were receiving any sort of vocational training in any Christian denomination, i.e., being taught to be preachers?

MR. McGORMELY: I'm going to object as too vague. Is this relating to specifically –

MR. BUCCHI: At Teen Ranch.

MR. McGORMELY: – in this time frame?

MR. BUCCHI: Well, let's start with since 2003, yeah.

MR. McGORMELY: Okay.

A Did I understand the question to be was I aware that any youth placed at Teen Ranch since 2003 were being educated to become preachers?

Q Yeah, at Teen Ranch.

A FIA State-supervised youth?

* * *

70

(2)

No. 07-363

FILED
OCT 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

*In the Supreme Court of the United States*

TEEN RANCH, INC, MATTHEW KOCH and MITCHELL KOSTER,

*Petitioners,*

v

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SIXTH CIRCUIT COURT OF APPEALS

# BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Assistant Attorney General
Attorneys for Respondents

## QUESTION PRESENTED

The State of Michigan places, and funds the care of, abused, neglected, and delinquent children in residential treatment programs, some of which, like Petitioner Teen Ranch, have a religious character. The State ceased placing children, and ceased funding, when it learned that the content of Teen Ranch's program included religious activities such as worship, religious instruction, and proselytization in violation of Michigan law, federal law, and the Establishment Clause of the First Amendment.

Is the State required by the Free Exercise Clause of the First Amendment, 42 USC § 604a, or State law to subsidize these activities?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 6

A. Juvenile Residential Care in Michigan. ..... 7

B. Teen Ranch's Residential Program ..... 9

C. Procedural History ..... 13

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED ..... 15

I. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT. ..... 15

A. The Court of Appeals correctly concluded that a federal court has no jurisdiction over a 42 USC § 604a claim. ..... 15

B. 42 USC § 604a does not apply to programs funded under Title IV-E of the Social Security Act, 42 USC § 670, et seq. ..... 16

C. 42 USC § 604a does not require the State to fund programs that include religious activities such as worship, instruction, or proselytization ..... 17

D. Teen Ranch never pleaded a violation of State law ..... 21

E. Even if Teen Ranch had pleaded a cause of action for violation of State law, the claims would lack merit because the State law prohibits direct funding for worship, instruction, and proselytization. ..... 21

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT. ..... 22

A. The Court of Appeals' decision does not conflict with Locke v Davey, which recognizes that some funding may be permissible under the Establishment Clause but not required under the Free Exercise Clause. ..... 22

B. The Court of Appeals' decision does not conflict with *Mitchell v Helms* or *Zelman v Harris* regarding funding under the Establishment Clause. ..... 26

III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS ..... 31

A. The facts and reasoning of the Seventh Circuit in *Freedom from Religion v McCallum* are distinguishable from this case. ..... 31

B. The facts and reasoning of the DC Circuit in *American Jewish Federation* are distinguishable from this case ..... 33

CONCLUSION ..... 34

APPENDIX TABLE OF CONTENTS

Buchanan Affidavit.....1b

January 9, 2004 Letter from Family Independence Agency.....4b

Teen Ranch Policy Directive.....10b

Teen Ranch Program Description.....23b

Teen Ranch Program Description.....24b

Teen Ranch Orientation Handbook.....25b

Teen Ranch Online Letter, March 2004.....49b

Teen Ranch Online Letter, May, 2004.....53b

Teen Ranch Online Letters Re: "The River," January and February, 2004.....56b

Teen Ranch "The River" description.....63b

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Agostini v Felton*,
521 US 203 (1997) ..... 30

*American Jewish Congress v Corp for National and Community Service*,
399 F3d 351 (DC Cir 2005) ..... 33

*Blessing v Freestone*,
520 US 329 (1997) ..... 15

*Chevron USA Inc v NRDC*,
467 US 837 (1984) ..... 20

*Church of Lukumi Babalu Aye, Inc v City of Hialeah*,
508 US 520 (1993) ..... 26

*Employment Div, Dept of Human Resources of Oregon v Smith*,
494 US 872 (1992) ..... 25

*Everson v Bd of Educ of Twsp of Ewing*,
330 US 1 (1947) ..... 29

*Freedom of Religion, Inc v McCallum*,
179 F Supp 2d 950 (WD Wisc 2002) (*McCallum I*) ..... 24, 32

*Freedom of Religion, Inc v McCallum*,
214 F Supp 2d 905 (WD Wisc 2002) (*McCallum II*) ..... 31, 32

*Freedom of Religion, Inc v McCallum*,
324 F3d 880 (7th Cir 2003) (*McCallum III*) ..... 31, 32

*Gonzaga Univ v Doe*,
356 US 273 (2002) ..... 15

*Hobbie v Unemployment Appeals Comm'n of Florida*,
480 US 136 (1987) ..... 25

*Johnson v Economic Development Corporation*,
241 F3d 501 (6th Cir 2001) ..... 28

*Lee v Weisman*,
505 US 577 (1992) ..... 30

*Lemon v Kurtzman*,
403 US 602 (1971) ..... 30

*Locke v Davey*,
540 US 712 (2004) ..... 23, 24, 25, 26

*McDaniel v Paty*,
435 US 618 (1978) ..... 25

*Mitchell v Helms*,
530 US 793 (2000) ..... 27, 28

*Mueller v Allen*,
463 US 388 (1983) ..... 29

*Pennhurst State Sch & Hosp v Halderman*,
465 US 89 (1984) ..... 21

*Rosenberger v Rector*,
515 US 819 (1995) ..... 28

*Santa Fe Independent Sch Dist v Doe*,
530 US 210 (2000) ..... 30

*Sherbert v Verner*,
374 US 398 (1963) ..... 25

*Thomas v Review Bd of the Indiana Employment Security Div*,
450 US 707 (1981) ..... 25

*Will v Michigan Dep't of State Police*,
491 US 58 (1989) ..... 15

*Witters v Washington Dept of Services of the Blind,*
474 US 481 (1986) ..... 29

*Zelman v Simmons-Harris,*
536 US 639 (2002) ..... 28, 29, 32, 33

*Zobrest v Catalina Foothills Sch Dist,*
509 US 1 (1993) ..... 29

**Statutes**

2003 PA 172 ..... 5

2004 PA 344 ..... 5, 21, 22

28 USC § 1254 ..... 1

42 USC § 1983 ..... 15

42 USC § 604a ..... passim

42 USC § 670 ..... 16

42 USC 601 ..... 16

MCL 400.114 ..... 7

MCL 400.115(1)(f) ..... 7

MCL 400.115(a) ..... 7

MCL 400.115(f) ..... 7

MCL 400.115a(1)(b) ..... 7

MCL 400.115a(1)(n) ..... 7

MCL 400.115b(1) ..... 7

MCL 400.115e ..... 7

PL 104-193 ..... 16

PL 96-272 ..... 17

**Constitutional Provisions**

US Const, Am I ..... 1

US Const, Am XIV § 1 ..... 1

## OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern District, is reported at 389 F Supp 2d 827 (WD Mich 2005) and is included at Petitioners' Appendix ("Pet. App. ") 18. The United States Court of Appeals for the Sixth Circuit's panel decision[1] affirming the District Court's opinion is reported at 479 F3d 403 (6th Cir 2007) and is included at Pet. App. 1. The denial of Petitioners' petition for rehearing and suggestion for rehearing *en banc* is not reported and is included at Pet. App. 54.

## JURISDICTION

On January 17, 2007, the Court of Appeals entered its order upholding the District Court's grant of summary judgment in favor of Respondents. Petitioners sought *en banc* review, which was denied on June 15, 2007. (Pet. App. 54.) This Court has jurisdiction to review the decision under 28 USC § 1254.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

US Const, Am I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

US Const, Am XIV § 1 states:

---

[1] The Court of Appeals' decision was initially unpublished; however, upon motion of the Respondents, the decision was published.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The federal law at issue, 42 USC § 604a states in part:

> (a) In general.
> (1) State options. A State may. . .
> (A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and
> (B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.
> (2) Programs described. The programs described in this paragraph are the following programs:
> (A) A State program funded under part A of title IV of the Social Security Act [42 USCS § 601 *et seq.*] (as amended by section 103(a) of this Act).
> (B) Any other program established or modified under title I or II of this Act, that--
> (i) permits contracts with organizations; or

(ii) permit certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) Religious organizations. The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) Nondiscrimination against religious organizations. In the event a State exercises its authority under subsection (a), religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom.

(1) Religious organizations. A religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards. Neither the Federal Government nor a State shall require a religious organization to—

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols; in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) Rights of beneficiaries of assistance.

(1) In general. If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described. An individual described in this paragraph is an individual who

receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2).

* * *

(i) Compliance. Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) Limitations on use of funds for certain purposes. No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

(k) Preemption. Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Michigan appropriations acts 2003 PA 172 and 2004 PA 344 state:

Sec. 220. (1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or

assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 USC 604a.

## STATEMENT

Petitioner Teen Ranch ("Teen Ranch")[2] alleges that the Michigan Family Independence Agency ("FIA")[3] is required to place, and fund the care of, abused, neglected, and delinquent children at Teen Ranch's juvenile residential treatment program. When FIA ceased placing children at the Teen Ranch in 2004 — because religion was an integral and required part of the program — Teen Ranch sought a temporary restraining

---

[2] For purposes of this Brief, Petitioners will be collectively referred to as "Teen Ranch."

[3] The FIA has since been renamed the Department of Human Services ("DHS"); however, this Brief will refer to Respondents as "FIA."

order, preliminary and permanent injunctive relief, a declaratory judgment, and monetary damages against the Respondents in their personal and official capacities as FIA employees.

Teen Ranch alleged that the State was required by the United States Constitution and a federal statute, 42 USC § 604a, to subsidize its religious residential treatment program for children. The District Court disagreed, finding that funding the Teen Ranch program would violate the Establishment Clause. The District Court also rejected Teen Ranch's Free Exercise and Freedom of Speech claims and their Due Process and Equal Protection claims. The United States Court of Appeals for the Sixth Circuit affirmed.

**A. Juvenile Residential Care in Michigan.**

FIA is responsible for providing care and supervision to abused, neglected, and delinquent children who have been committed to, or placed in the care of, FIA.[4] FIA may provide out-of-home care to these children or contract with private organizations to provide these services.[5] FIA is responsible for monitoring and evaluating all children's services programs it funds.[6]

FIA contracts with 96 private child care agencies to provide services to FIA youth and their families. Of these, at least 35 are faith-based providers. However, Teen Ranch is the only faith-based provider known to FIA that has incorporated its religious beliefs and teaching into the services funded under its contract with

---

[4] *See, generally* MCL 400.114 - 400.115e, and specifically, MCL 400.115(a) and (f), 400.115a(1)(b), 400.115b(1).

[5] MCL 400.115(a); MCL 400.115(1)(f).

[6] MCL 400.115a(1)(b) and (n).

FIA. (Private Agency Contractors Listing, Court of Appeals Joint App. p. 323; Resp. App. p. 2b, Buchanan Affidavit, Court of Appeals Joint App. p. 326.)

Neither a child nor the child's parent independently chooses the child's placement. Rather, in the juvenile delinquent case, it is the State, through a computer assignment system that selects the placement for the child. In an abuse and neglect foster care case, it is the FIA worker and the State Court that decides the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1107-1117; Slottke Deposition, Court of Appeals Joint App. pp. 1123-1130.) Because Teen Ranch's lawsuit was seeking prospective relief and Teen Ranch indicated it was no longer going to accept abuse and neglect children, the focus of the case became the delinquency placement process.

The focus in treatment in the delinquency placement is on the treatment needs of the child. (Slottke Deposition, Court of Appeals Joint App. pp. 1134, 1137.) The agency with the best treatment match receives the placement. If two facilities are equal, the facility that has waited the longest receives the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1109-1110.) The caseworker and the court determine any changes to placement. (Slottke Deposition, Court of Appeals Joint App. pp. 1134-1135.) The "one override on the entire situation is if the court has ordered or recommended a specific placement. . . ." (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1109-1110.) Religion is not a factor in the placement process. (Slottke Deposition, Court of Appeals Joint App. pp. 1131-1132.)

**B. Teen Ranch's Residential Program**

FIA contracted with Teen Ranch to provide residential treatment and care for youth in need of services.[7] (FIA and Teen Ranch Agreement, Court of Appeals Joint App. p. 187.) In October – November 2003, FIA conducted a Quality Assurance Review of the Teen Ranch program. (11/6/03 letter, Court of Appeals Joint App. p. 228; 12/2/03 letter, Court of Appeals Joint App. p. 232.) That review made FIA aware that Teen Ranch was "improperly incorporating religious teaching into the daily activities and treatment plans" of youth placed there by FIA. (Resp. App. p. 4b-5b; 1/9/04 letter, Court of Appeals Joint App. p. 250.)

The foregoing conclusion was based on interviews with residents, Teen Ranch brochures, and reports from a local FIA office and the Michigan Department of Consumer and Industry Services ("DCIS"), the agency that then licensed child care institutions. (Resp. App. pp. 4b-9b; 1/9/04 letter, Court of Appeals App. pp. 250-252.) Specifically, ten youth reported being required to participate in religious services, including three who stated that they would "lose points" if they did not attend religious services. One stated that he was "placed out of program" and was required to do "criteria" for not participating in religious services, and one reported that she was required to attend "the River," a religious component of the Teen Ranch program. In addition, on November 7, 2003, a local FIA office received a complaint of a child forced to attend church services with her group. On December 4, 2003, DCIS received a complaint

---

[7] FIA's last contract extension with Teen Ranch expired on October 1, 2003. Because of the pending problems with Teen Ranch, FIA did not sign a contract extension. (Sixth Circuit Apx. p. 224.)

from another youth and her parent that a therapist at Teen Ranch had repeatedly interjected religious issues into therapy with the youth. (Resp. App. p. 5b-6b; 1/9/04 letter, Court of Appeals Joint App. p. 251; 3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 257-261, 262-265, 266-272.)

It is impractical to recite the breadth of evidence that establishes Teen Ranch's goals of religious indoctrination and pervasive inclusion of religion into the residential program. However, a number of statements encapsulate these facts. Teen Ranch's leadership has professed:

> **Surely we hope to *convert* the wayward youth with whom we come in contact to the knowledge of and devotion to Christ Jesus. . . . This is why church attendance, prayer, Bible study and the like has always been encouraged,** never mandated at Teen Ranch as part of an effective treatment program. . . . [Resp. App. p. 17b; Policy Directive, Court of Appeals Joint App. p. 628 (emphasis added).]

Teen Ranch's "mission" is "[p]roviding hope to young people and families through life changing relationships and experiences from a Christian perspective." (Resp. App. p. 23b; 3/5/04 Program Description, Court of Appeals Joint App. p. 396.) Its program description states, "Each model [of residential care] is designed to meet the children's needs through. . . . Spiritual reconciliation through the grace of God." (Resp. App. p. 24b; Program Description, Court of Appeals Joint App. p. 398.) The Teen Ranch Orientation and Information Handbook states:

> The basis of everything done at Teen Ranch revolves around . . . everyone building a closer relationship to Jesus Christ.
>
> * * *
>
> At Teen Ranch your child will receive the kind of environment that is . . . based upon Godly mentoring, and provided by Christian staff. Through the building of healthy relationships, the staff at Teen Ranch offers your child . . . *the knowledge of being made in the Image of God, then equipped with the tools to become a Kingdom Builder.* [Resp. App. p. 32b, 41b, Orientation Handbook, Court of Appeals Joint App. p. 362; see also Resp. App. pp. 49b-52b, March, 2004 Online Letter, Court of Appeals Joint App. pp. 402-404 and Resp. App. pp. 53b-55b, May, 2004 Online Letter, Court of Appeals Joint App. pp. 406-408.]

The religious programs and services that Teen Ranch provides to these children are consistent with Teen Ranch's mission of religious indoctrination. It is against this backdrop that FIA also learned that there was the pervasive inclusion of religion in the specific components and activities of the program. First, religious activities were included in the children's therapy. As part of the treatment program at Teen Ranch, children were required to attend a therapy program called "The River," which was religious in nature. (Resp. App. pp. 56b-62b; January, 2004 Online Letter, Court of Appeals Joint App. pp. 439-443; Resp. App. pp 63b-66b, The River Information, Court of Appeals Joint App. pp. 622-623.) Therapy included religious discussions, devotional time, Bible time, and prayer time. (3/24/04 Hearing Transcript, Court of Appeals Joint App. p. 274; Beatty Deposition, Court of Appeals Joint App. pp. 413, 418.)

Second, religious activities were part of the children's weekly and daily schedule. (Beatty Deposition, Court of Appeals Joint App. p. 412.) This would include daily devotions and prayer and weekly church attendance. (Beatty Deposition, Court of Appeals Joint App. pp. 411-413, 414, 416-417.)

Third, a youth's willingness to participate in religious activities, like church attendance, could affect their privileges and how long they were in the program. (Beatty Deposition, Court of Appeals Joint App. pp. 414, 417, 420-422, 429-430.) Likewise, Teen Ranch's Chief Operations Officer testified how staff announced that it was time for religious activities and how a child could express an objection. However, his testimony indicates how pressure could affect whether a child participated. (3/24/04 Hearing Transcript, Court of Appeals Joint App. p. 276.)

Teen Ranch's opt-in and opt-out procedure for children attending Teen Ranch, which was raised after the start of litigation, was proffered by Teen Ranch as an Establishment Clause cure-all. But, by its terms and Teen Ranch's explanation, that procedure would require Teen Ranch staff and State FIA workers to determine whether a child **truthfully** held an objection to Teen Ranch's **religious program**. (Resp. App. pp. 18b-20b, Policy Directive, Court of Appeals Joint App. pp. 627-630; Koch Deposition, Court of Appeals Joint App. pp. 336-342.) It also does not take into account that abused, neglected, and delinquent children and their parents do not choose the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1107-1117; Slottke Deposition, Court of Appeals Joint App. pp. 1123-1130.)

Quite simply put, Teen Ranch has advised that "incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care." (Amendment of Corrective Action Plan, Court of Appeals Joint App. p. 640.)

C. Procedural History

On November 6, 2003, FIA imposed a moratorium on new placements at Teen Ranch because FIA believed "Teen Ranch administration and operating practices fail[ed] to assure the safety and well-being of the youth in residence." (11/6/03 letter, Court of Appeals Joint App. p. 228.) This moratorium was not a response to the religious nature of the program; rather it was based on safety issues. Although FIA had interviewed youth, it was not until December 2003 that FIA confirmed that religion was an inherent part of Teen Ranch's program. Only then religion became the issue, and FIA and Teen Ranch attempted to resolve the matter, however, to no avail because Teen Ranch refused to remove religious worship instruction, and proselytization from its program content. (Buchanan Deposition, Court of Appeals Joint App. pp. 280-281; 12/16/03 letter, Court of Appeals Joint App. p. 293; Resp. App. pp. 7b-9b; 1/9/04 letter, Court of Appeals Joint App. pp. 250-252.) Teen Ranch filed suit on February 20, 2004, seeking declaratory, injunctive relief, and damages. Teen Ranch also sought a temporary restraining order, which the District Court promptly denied.

The moratorium was lifted briefly, at the advice of counsel, to give FIA time to prepare for the preliminary injunction hearing. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 255-256.) But it was

reinstituted in April 2004 after the District Court denied Teen Ranch's preliminary injunction motion. (Michael Deposition, Court of Appeals Joint App. pp. 300-302.) FIA's primary concerns were the inclusion of religion into the treatment program and situations where youth were required to participate in activities that were infused with religion. (Buchanan Deposition, Court of Appeals Joint App. pp. 282-283.) FIA chose not to remove the State-placed youth in care because it did not want to unnecessarily disrupt placement of children if there was potential to resolve the issue. But case managers were instructed to visit State youth in care at Teen Ranch. (Buchanan Deposition, Court of Appeals Joint App. pp. 284, 285, 290.) Teen Ranch voluntarily closed its residential program in June, 2004. (6/14/04 E-mail, Court of Appeals Joint App. p. 317; Koster Deposition, Court of Appeals Joint App. p. 320.)

The parties filed cross-motions for summary judgment. The District Court heard oral argument and dismissed Teen Ranch's case. (Pet. App. 18.) The Court of Appeals affirmed. (Pet. App. 1.)

## REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The Court of Appeals' decision is correct and does not conflict with any decision of this Court or any other court. Further, the decision below does not present an important issue of federal law that should be decided by this Court. This Court's review is, therefore, not warranted.

### I. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

#### A. The Court of Appeals correctly concluded that a federal court has no jurisdiction over a 42 USC § 604a claim.

Teen Ranch brought suit under 42 USC § 1983 to enforce an alleged violation of 42 USC § 604a. Section 1983 imposes liability on anyone who, under color of State law, deprives a person of any right "secured by the Constitution and laws."[8] However, not every federal statute creates a "right" enforceable under § 1983.[9] To the extent that Congress intends to confer an enforceable right upon individuals, "it must make its intentions to do so unmistakably clear in the language of that statute."[10]

Congress made it unmistakably clear that 42 USC § 604a does not create private rights enforceable in federal court: "any party which seeks to enforce its rights under

---

[8] 42 USC § 1983.

[9] *Blessing v Freestone*, 520 US 329 at 340 (1997).

[10] *Gonzaga Univ v Doe*, 356 US 273, 286 (2002), citing *Will v Michigan Dep't of State Police*, 491 US 58, 65 (1989).

this section **may assert a civil action for injunctive relief exclusively in an appropriate state court** against the entity or agency that allegedly commits such violations."[11] Where Congress unequivocally stated that any judicial remedy for enforcement of a § 604a claim must be brought in a State court, the District Court lacked jurisdiction over Teen Ranch's § 604a claim.

Accordingly, the Court of Appeals was correct in its conclusion that a § 604a claim "is not cognizable in federal court." (Pet. App. 16; 479 F3d at 411.)

**B. 42 USC § 604a does not apply to programs funded under Title IV-E of the Social Security Act, 42 USC § 670, et seq.**

This case involves State funding of residential treatment for children who are under FIA's care and supervision. (Complaint, ¶¶ 1, 24, Complaint, Court of Appeals Joint App. pp. 13, 16.) The State is eligible for federal reimbursement for a portion of its foster care placement costs under Title IV-E of the Social Security Act.[12] Title IV-E is silent regarding services provided by religious organizations. 42 USC § 604a, cited in the Complaint, is part of Title IV-A of the Social Security Act, 42 USC § 601, *et seq.*, which governs State grants for "temporary assistance for needy families" (TANF).[13] The funds paid to Teen Ranch were not TANF funds.

---

[11] 42 USC § 604a(i) (emphasis added).

[12] 42 USC § 670 *et seq.*

[13] TANF is the public assistance program that replaced "Aid to Families with Dependent Children" (ADC). TANF was created through the Personal Responsibility Work Opportunity Reimbursement Act (PRWORA) of 1996, PL 104-193.

By its terms, § 604a only applies to State programs funded under Title IV-A and any other programs "established or modified under Title I or II of the Act."[14] As explained in the "History" section following § 604a, "Title I or II of the Act" refers to Title I or II of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). (LEXIS at 42 USC 604A, Court of Appeals Joint App. p. 653.) Title IV-E was established in 1980 through PL 96-272. As reflected in the US Department of Health and Human Services' ("HHS") responses to questions FIA posed to it (6/14/04 E-mail, Court of Appeals Joint App. p. 317), Title I and II of PRWORA made no substantive changes to Title IV-E. Therefore, since any funding that could flow to Teen Ranch would be Title IV-E funding, § 604a is inapplicable to Teen Ranch's claims. (See specifically, Q&A No. 3, 2/23/04 E-mail, Court of Appeals Joint App. p. 659.) The District Court recognized that Teen Ranch failed to demonstrate that § 604a even applied to funding under Title IV-E. (Pet. App. 50; 839 F Supp 2d at 841-842.)

### C. 42 USC § 604a does not require the State to fund programs that include religious activities such as worship, instruction, or proselytization.

Assuming *arguendo* that the District Court had jurisdiction over Teen Ranch's statutory claim and that 42 USC § 604a applied to Title IV-E funded programs, there is, nonetheless, no merit to the claim that FIA's refusal to fund Teen Ranch's religious activities violated § 604a.

Section 604a(a) provides in relevant part:

---

[14] 42 USC § 604a(a)(2).

> (1) State options. A State may—
>
> (A) administer and provide services under the programs described in paragraph (2) through contracts with charitable, religious, or private organizations. . . ."

Teen Ranch claimed that FIA violated § 604a(c), which states in relevant part:

> **Except as provided in subsection (k)**, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance . . . on the basis that the organization has a religious character. [Emphasis added.]

Subsection (k) states:

> Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Under § 604a(c) and (k), any State constitution or statute that prohibits or restricts the expenditure of State funds in or by religious organizations trumps § 604a's provision regarding discrimination against organizations of a religious character. Michigan law also prohibits direct funding to religious programming that results in religious instruction, proselytization, or worship.[15] Thus, even if Teen Ranch's program did not include sectarian worship, instruction, or proselytization,

---

[15] 2003 PA 172.

the State could still choose through its laws or constitution to not fund programs operated by religious organizations under § 604a(k).

But assuming no State law prohibition, under subsection (c), if a State opts to contract with private organizations for services covered under § 604a, the State cannot refuse to do business with a religious character **solely** because the entity is a religious organization. FIA's complaint with Teen Ranch was not that it was a religious organization or was operated by a religious organization, but that it infused sectarian worship, instruction, and proselytization as an integral part of the **program** paid for by the State. Indeed, FIA contracts with dozens of religious-affiliated organizations to provide residential care services. (12/16/03 letter, Court of Appeals Joint App. pp. 293 and 299.)

Furthermore, direct funding of religious **content**-based programs is expressly prohibited by 42 USC § 604a(j):

> No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

In other words, the statute that distinguishes between an organization that simply has a **religious character** and an organization that has a religious character and also incorporates religious worship, instruction, or proselytization as part of its **day-to-day services and programs** it provides to its recipients. Funding of the latter is prohibited under § 604a. Religion was an integral part of the Teen Ranch program. By directly placing children in juvenile residential care at Teen

Ranch and directly funding the placement, the State would violate the statute.

This interpretation is consistent with HHS' interpretation of § 604a, which indicates direct funding of religious activity is inappropriate. (2/23/04 E-mail, Court of Appeals Joint App. pp. 660-663) HHS is the agency that administers both the Title IV-A and IV-E programs at the federal level. HHS' interpretation of the statute it administers is entitled to substantial deference.[16]

FIA consistently acted in conformance with the principles of § 604a. Teen Ranch's claims that FIA was acting to persecute or single out Teen Ranch in violation of the statute because of animosity toward Teen Ranch's religious character are simply wrong. FIA's actions were taken because of the content of the State-funded program. The subjective nature of Teen Ranch's claim can be seen at page 20 of Teen Ranch's Petition for Certiorari when it only partially quotes from the deposition of Debora Buchanan, the Manager for the Purchased Care Division for FIA. But when the full sentence of Ms. Buchanan's position is provided, a different picture emerges. The complete sentence follows:

> My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera, **into their daily treatment and ongoing care for youth.** [Pet. App. p. 71 (emphasis added to note the portion of testimony eliminated by ellipses by Teen Ranch).]

---

[16] *Chevron USA Inc v NRDC*, 467 US 837, 844 (1984).

If § 604a applies, FIA's decision to not directly fund the content of Teen Ranch's program that included religious worship, instruction, or proselytization is consistent with § 604a.

**D. Teen Ranch never pleaded a violation of State law.**

Teen Ranch's Complaint alleged no violation of State law. Teen Ranch cannot obtain a judgment on a claim that it failed to plead pursuant to 2003 PA 172 or 2004 PA 344. The District Court properly recognized this point. "Plaintiffs did not clearly allege a violation of State law as a basis for relief in their complaint." (Pet. App. 51; 839 F Supp 2d at 842.) Further, to the extent that Teen Ranch sought prospective injunctive relief, the District Court properly recognized that its claims were against the named FIA employees in their official capacities and are governed by the Eleventh Amendment. (Pet. App. 51; 839 F Supp 2d at 842.) The Eleventh Amendment prohibits federal courts from enjoining State officials for violations of State law.[17]

**E. Even if Teen Ranch had pleaded a cause of action for violation of State law, the claims would lack merit because the State law prohibits direct funding for worship, instruction, and proselytization.**

Assuming the District Court had exercised supplemental jurisdiction and Teen Ranch had pleaded a claim related to 2003 PA 172 or 2004 PA 344, the claims would fail for the same reasons the claim under 42 USC

---

[17] *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 100 (1984).

§ 604a failed. 2003 PA 172 and 2004 PA 344 included the same prohibitory language:

> Sec. 220. (1) In contracting with faith-based organizations . . . the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

Direct funding of religious activities is prohibited. It is undisputed that religion is an integral part of Teen Ranch's program and that funds provided directly to Teen Ranch by the State would be used for prohibited sectarian activity.

## II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

### A. The Court of Appeals' decision does not conflict with Locke v Davey, which recognizes that some funding may be permissible under the Establishment Clause but not required under the Free Exercise Clause.

Teen Ranch argues that the State **must** subsidize its religious program or the State violates the Free Exercise Clause. However, while some funding may be permissible under the Establishment Clause it is not required under the Free Exercise Clause. The State did not encroach upon Teen Ranch's right to free exercise of religion. Therefore, there is no merit to Teen Ranch's argument that FIA **must**, under the Free Exercise Clause, fund placements of its wards at Teen Ranch.

This Court recently addressed this issue in *Locke v Davey* where it held that a State was not required to award State-funded scholarships to students pursuing theology degrees.[18] In reaching this conclusion, this Court stated[19]:

> These two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. . . . Yet we have long said that "there is room for play in the joints" between them. . . . In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

*Locke* distinguished a State's refusal to fund a religious activity from State laws imposing penalties on certain religious practices. The former is acceptable under the Free Exercise Clause; the latter is not[20]:

> Davey . . . contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc v Hialeah*, [508 US 520 (1993)], the [Promise Scholarship] program is presumptively unconstitutional because it is not facially neutral with respect to religion. . . . We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. . . . In the

---

[18] *Locke v Davey*, 540 US 712 (2004).

[19] *Locke*, 540 US at 718-719.

[20] *Locke*, 540 US at 720-721.

> present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . And it does not require students to choose between their religious beliefs and receiving a government benefit. . . . The State has merely chosen not to fund a distinct category of instruction.

As in *Locke*, there was no demonstrable animus toward religion when FIA decided not to contract with providers of children's services —like Teen Ranch — that admittedly incorporated religion into those services and expended State funds on religious activity. FIA has not inhibited religious practice or penalized religious participants civilly or criminally. In fact, FIA has contracted with numerous other religious providers of social services. However, those providers separate their religious activities from their social services. (Resp. App. p. 2b, Buchanan Affidavit, Court of Appeals Joint App. p. 327.) As in *Locke*, the State may permissibly choose not to fund placements of youth in a facility that espouses and advances a religious faith as an integral part of the program.[21]

None of the other cases cited by Teen Ranch supports their claim. In *Employment Div Dept of Human*

---

[21] See also *Freedom From Religion v McCallum*, 179 F Supp 2d 950, 981-82 (WD Wis 2002) (a state's refusal to fund social services programs that include religious content does not violate the Free Exercise Clause of the First Amendment).

*Resources of Oregon v Smith*,[22] this Court held that a prohibition against a religious use of peyote was not a violation of the Free Exercise Clause, and denial of unemployment benefits to individuals fired for using peyote as part of a religious ceremony did not violate the Free Exercise Clause. And *Sherbert v Verner*,[23] *Thomas v Review Bd of the Indiana Employment Security Div*[24] and *Hobbie v Unemployment Appeals Comm'n of Florida*,[25] all dealt with denials of unemployment compensation benefits to individuals fired for refusing to work on their Sabbath, or to engage in other activities forbidden by their religion. This Court, in each of these cases, held that the government could not deny a public benefit— unemployment compensation—based on the worker's religious beliefs. But no public benefit or entitlement program is involved here. Teen Ranch had no constitutional right to force FIA to purchase its religiously-infused residential treatment services for State wards.

This Court distinguished this line of cases in *Locke*.[26] The State may choose to not fund inherently religious activity and need only have a rational basis for doing so. Similarly, *Locke* distinguished *McDaniel v Paty*,[27] another case cited by Teen Ranch. *McDaniel* held that ministers could not be prohibited from serving as State legislators because the prohibition violated their right to

---

[22] *Employment Div, Dept of Human Resources of Oregon v Smith*, 494 US 872 (1992).

[23] *Sherbert v Verner*, 374 US 398 (1963).

[24] *Thomas v Review Bd of the Indiana Employment Security Div*, 450 US 707 (1981).

[25] *Hobbie v Unemployment Appeals Comm'n of Florida*, 480 US 136 (1987).

[26] *Locke*, 540 US at 720-721.

[27] *McDaniel v Paty*, 435 US 618 (1978).

free exercise of religion. As noted in *Locke*, no similar right is involved in cases involving State funding of religious programs.[28] Finally, *Locke* also distinguished *Church of Lukumi Babalu Aye Inc v City of Hialeah* which prohibited the criminalization of religious ritualistic animal sacrifices.[29] This Court found no analogy between criminal or civil sanctions for the practice of religion to cases involving government funding of religious activity.[30]

Accordingly, the Court of Appeals properly affirmed the District Court's dismissal of Teen Ranch's Free Exercise Claims. (Pet. App. 12; 479 F3d at 409-410, 411-412.)

**B. The Court of Appeals' decision does not conflict with *Mitchell v Helms* or *Zelman v Harris* regarding funding under the Establishment Clause.**

Teen Ranch argues that the Court of Appeals' decision is inconsistent with this Court's decisions on private choice. Private choice can operate as a circuit breaker between the government and religion, and the existence of private choice may allow a funding scenario to pass Establishment Clause muster. However, Teen Ranch's desire for the State to subsidize its religious program for abused, neglected, and delinquent children who do not have true genuine private independent choice, does not pass constitutional muster. The Court of Appeals' decision is consistent with this Court's precedent.

---

[28] *Locke*, 540 US at 720.

[29] *Church of Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520 (1993).

[30] *Locke*, 540 US at 720-721.

In *Mitchell v Helms*, a plurality opinion, this Court concluded that a federal law that authorized the federal government to distribute funds to State and local governmental agencies that in turn loaned, on a per capita student basis, educational materials, software, and equipment to religious and nonreligious schools, did not violate the Establishment Clause.[31]

In addressing whether there was governmental indoctrination, a plurality of the Justices opined that the aid was allocated on neutral secular criteria that did not favor or disfavor religion.[32] On the question of whether the act advanced religion, the plurality opined that the program made a broad range of schools eligible without regard to religion and that the aid reached schools only through private decision-making and contained no impermissible content.[33] The plurality attempted to move away from the direct versus indirect aid distinction for purposes of determining governmental indoctrination and instead focused on private choice, which operates as a circuit breaker between the government and religion. But the plurality recognized that the two analyses addressed the same thing, and the direct versus indirect distinction was meant to prevent religion from being subsidized by the government.[34] In *Mitchell*, because private decision-making was involved, the direct aid of materials and equipment was not at issue.[35] But the plurality recognized that the case did not involve direct

---

[31] *Mitchell v Helms*, 530 US 793, 835 (2000).

[32] *Mitchell*, 530 US at 829-830.

[33] *Mitchell*, 530 US at 830-832.

[34] *Mitchell*, 530 US at 815-816.

[35] *Mitchell*, 530 US at 815-818; 831.

money payments and noted direct money payments raise "special Establishment Clause dangers."[36]

*Mitchell* does not provide support for Teen Ranch's claims. First, in this case, there was direct payment of money from the State to Teen Ranch. Second, *Mitchell* does not stand for the proposition that funds can be used or diverted to advance the religious missions of religious schools.[37] Third, there was no true private choice in the case at bar because those placed at Teen Ranch were vulnerable children under the State's jurisdiction and supervision, and the children and their parents do not choose the placement. Fourth, *Mitchell* speaks to Establishment Clause concerns and not a claim under the Free Exercise clause.

In *Zelman v Harris*, this Court found no Establishment Clause violation in a school voucher program.[38] In *Zelman*, this Court concluded that the voucher program was one of true private choice because it was neutral as to religion. The Court found no "financial incentive" that "skewed" the program toward religious schools, where there was a full range of religious and nonreligious educational options available to parents.[39]

---

[36] *Mitchell*, 530 US at 818-820, quoting *Rosenberger v Rector*, 515 US 819, 842 (1995).

[37] *Mitchell*, 530 US at 840-844 (O'Connor, J, concurring) (Justice O'Connor's opinion was controlling on the Sixth Circuit because it was the narrowest concurrence on a non-majority opinion and did not accept that money can be diverted for religious use. See *Johnson v Economic Development Corporation*, 241 F3d 501, 510 (6th Cir 2001).

[38] *Zelman v Simmons-Harris*, 536 US 639, 662-663 (2002).

[39] *Zelman*, 536 US at 653-656.

There are a number of reasons why the subsidization of Teen Ranch's religious program is not similar to the voucher program in *Zelman*. First, there was no true genuine independent private choice involved because the State determined the children's placement, and neither the children, nor their parents selected from a broad range of choices. Second, the children here were under the care and supervision of the State. Third, there was no intervening step of a voucher. Fourth, *Zelman* did not involve a claim that funding was required under the Free Exercise Clause.

Neither *Zelman* nor the other funding cases argued by Teen Ranch support its claims. *Everson v Board of Education of the Twsp of Ewing,*[40] *Mueller v Allen,*[41] *Witters v Washington Dept of Services for the Blind,*[42] and *Zobrest v Catalina Foothills Sch Dist*[43] all involved payment for certain educational expenses for **families who freely and independently chose** religious educations for their children. Unlike Teen Ranch's situation, the benefits were not paid directly to an organization for religious programs.

---

[40] *Everson v Bd of Educ of Twsp of Ewing*, 330 US 1 (1947) (rejected Establishment Clause challenge to authorization for reimbursement to parents with a child in private school for the cost of busing).

[41] *Mueller v Allen*, 463 US 388 (1983) (rejected Establishment Clause challenge to a program allowing tax deductions for educational expenses, including private school tuition).

[42] *Witters v Washington Dept of Services of the Blind*, 474 US 481 (1986) (rejected Establishment Clause challenge to a vocational scholarship program).

[43] *Zobrest v Catalina Foothills Sch Dist*, 509 US 1 (1993) (rejected Establishment Clause challenge to federal program that permitted a sign-language interpreter to assist hearing-impaired students in religious schools).

With the direct payment and without genuine independent choice, the funding of Teen Ranch would not pass constitutional muster under the Establishment Clause. This Court in *Lemon v Kurtzman* articulated a test for determining when a statute or program violates the Establishment Clause[44] and refined the test in *Agostini v Felton*.[45] The three primary criteria the Supreme Court uses to determine whether government aid advances religion are: (1) whether there is governmental indoctrination; (2) whether the participants are defined by reference to religion; and (3) whether there is excessive entanglement between government and religion.[46] The funding of Teen Ranch would violate all prongs of the *Lemon-Agostini* test.

Specifically as to the indoctrination prong, this Court in *Lee v Weisman*[47] and *Santa Fe Independent School District v Doe*,[48] emphasized that a policy that allows a child to opt out of a State-endorsed group religious activity does not shield the activity from Establishment Clause scrutiny. This Court found that placing children in a position where they must affirmatively opt out of a government-endorsed religious activity is unacceptable under the Establishment Clause.[49] As to the other two prongs, the participants would be defined by reference to religion, and attempting to fully advise, judge, and determine a child's religious convictions in light of a religious program using an opt-in or opt-out scenario would foster excessive entanglement between the State and religion.

---

[44] *Lemon v Kurtzman*, 403 US 602 (1971).

[45] *Agostini v Felton*, 521 US 203, 221-223 (1997).

[46] *Agostini*, 521 US at 234.

[47] *Lee v Weisman*, 505 US 577 (1992).

[48] *Santa Fe Independent Sch Dist v Doe*, 530 US 210 (2000).

[49] *Lee*, 507 US at 593.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

## III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS.

Teen Ranch attempts to manufacture a conflict between the Court of Appeals' decision and decisions from other circuits. However, there are no conflicts because the cases cited by Teen Ranch involve genuine independent private choice exercised by adults and not cases involving abused, neglected, and delinquent children who do not choose their placements and who are under the supervision of the State.

### A. The facts and reasoning of the Seventh Circuit in *Freedom from Religion v McCallum* are distinguishable from this case.

Teen Ranch alleges that the Court of Appeals' decision conflicts with the Seventh Circuit's opinion in *Freedom of Religion, Inc v McCallum.*[50] In *McCallum* neither the district court nor the Seventh Circuit found an Establishment Clause violation where adult parolees could choose between a Christian half-way house and at least one other secular half-way house.[51] The district

---

[50] *Freedom of Religion, Inc v McCallum*, 324 F3d 880 (7th Cir 2003) (*McCallum III*).

[51] *Freedom of Religion, Inc v McCallum*, 214 F Supp 2d 905 at 907, 912-913 (WD Wisc 2002) (*McCallum II*); 324 F3d 880 (7th Cir 2003).

court recognized that indirect funding of faith-based organizations occurs through genuine independent private choice of individuals.[52] In that case, the district court recognized that the issue was a close call, and noted that the participants were **not children**.[53] The Seventh Circuit affirmed the district court, equating Faith Works to a school voucher scenario.[54]

*McCallum* is distinguishable from this case for a number of significant reasons. First, this case involves vulnerable and troubled children who are State or court wards and who are not adults capable of making treatment decisions. Second, neither the children, nor their parents, decide the placement. Third, the children had no "genuine independent private choices" of programs. Although Teen Ranch proposed that a child or his parents might "opt out" or "opt in" to Teen Ranch, the initial and ultimate placement decisions are the State's, which makes sense because the children are abused, neglected, and delinquent. Fourth, *McCallum* was brought by taxpayers challenging Faith Works under the Establishment Clause and not by Faith Works claiming funding was required under the Free Exercise Clause. In contrast, Teen Ranch is claiming it **must** be funded.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass

---

[52] *Freedom of Religion, Inc v McCallum*, 179 F Supp 2d 950, 970 (WD Wisc 2002) (*McCallum I*).

[53] *McCallum*, 214 F Supp 2d at 907, 915-916, 919 (*McCallum II*).

[54] *McCallum*, 324 F3d at 882, citing *Zelman v Simmons-Harris*, 536 US 639.

constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

**B. The facts and reasoning of the DC Circuit in *American Jewish Federation* are distinguishable from this case.**

The US Court of Appeals for the District of Columbia Circuit in *American Jewish Congress v Corp for National and Community Service,* addressed whether the AmeriCorps Education Awards Program, operated by the Corporation for National and Community Service, advanced religion and thereby violated the Establishment Clause.[55] In *Jewish Congress*, those seeking an award had to perform community service in an approved program. The case involved those who fulfilled this service requirement by teaching in religious schools. The D.C. Circuit concluded that there was no Establishment Clause violation, in part, because there was independent private choice.[56]

The DC Circuit relied on *Zelman,* which is significant for three reasons. First, there was no direct money payment to the funding recipient in *Zelman*, whereas here, there was a direct monetary payment to Teen Ranch. Second, contrary to the facts in *Zelman*, there was no intervening step where a voucher is given to an individual. In *Zelman*, parents were able to make independent choices about the school their child would attend. Third, the youth placed at Teen Ranch were children, especially emotionally fragile or damaged children, who did not choose their placements freely or independently.

---

[55] *American Jewish Congress v Corp for National and Community Service*, 399 F3d 351 (DC Cir 2005).

[56] *Jewish Congress*, 399 F3d at 356, 358.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Assistant Attorney General
Attorneys for Respondents

Date: October, 2007

# APPENDIX

TABLE OF CONTENTS

Buchanan Affidavit.....1b

January 9, 2004 Letter from Family Independence Agency.....4b

Teen Ranch Policy Directive.....10b

Teen Ranch Program Description.....23b

Teen Ranch Program Description..... 24b

Teen Ranch Orientation Handbook.....25b

Teen Ranch Online Letter, March 2004.....49b

Teen Ranch Online Letter, May, 2004.....53b

Teen Ranch Online Letters Re: "The River," January and February, 2004.....56b

Teen Ranch "The River" description.....63b

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

TEEN RANCH, et al,

Plaintiffs, No. 5:04CV0032

v Hon. Robert Holmes Bell

MARIANNE UDOW, et al,

Defendants.

---

AFFIDAVIT OF DEBORA BUCHANAN

STATE OF MICHIGAN )

) ss

COUNTY OF INGHAM )

Debora Buchanan, being first duly sworn, says as follows:

1. I am manager of the Purchased Care Division of the Office of Children and Family Services within the Michigan Family Independence Agency.

2. This affidavit is made on my personal knowledge, and if sworn as a witness, I am competent to testify to the facts contained herein.

3. In October-November 2003, FIA conducted a Quality Assurance Review of the Teen Ranch program. As part of that review, FIA became aware that Teen Ranch was improperly incorporating

religious teaching into the daily activities and treatment plans of youth placed there by FIA.

4. FIA's last contract extension with Teen Ranch expired on October 1, 2003. Because of the pending problems with Teen Ranch, FIA has not signed the current contract extension.

5. As a result of concerns that surfaced through the Quality Assurance Review, FIA imposed a moratorium on new placements to Teen Ranch. To date, Teen Ranch has been unwilling to provide FIA with assurances that it will not impose its religious beliefs, teaching or worship on the youth in its program.

6. FIA contracts with 96 private child care agencies to provide services to FIA youth and their families. Of these, at least 35 are faith-based providers. However, Teen Ranch is the only one known to incorporate its religious beliefs and teaching into the services funded under its contract with FIA.

7. The individuals being served by the Teen Ranch program are vulnerable and troubled children who are abused, neglected and delinquent. They are children who are state or court wards, under the care and supervision of FIA. It is FIA who decides on their placement. While there is currently an option for a child and/or his parents to "opt out" out of a Teen Ranch placement, both the initial and ultimate placement decision is still the State's.

8. FIA has chosen not to remove children already placed in Teen Ranch to avoid disruption of

ongoing treatment, at least until Plaintiffs' motion for preliminary injunction is resolved. See Exhibit I.

9. Exhibit L to Defendants' brief is the U.S. Department of Health and Human Services (HHS) responses to questions posed to it by FIA.

10. Exhibit M to Defendant's brief represents the number of FIA delinquency placements at Teen Ranch from 10/1/02 through 3/12/04.

11. In December 2003, Teen Ranch notified FIA that it would be taking no new abuse and neglect placements.

FURTHER AFFIANT SAYETH NOT.

/s/_____
Debora Buchanan
Michigan Family Independence Agency

Subscribed and sworn to before me
this 12th day of March, 2004

/s/_____
Ingham County, Notary Public
Commission Expires:

[Letterhead Omitted]

January 9, 2004

Mr. Matt Koch, Executive Director
Teen Ranch Family Services
2861 Main Street
Marlette, M 48453

Dear Mr. Koch,

On October 28, 29 and 30, 2003, Richard Jansen, Purchased Care Analyst and William White, Purchased Care Division Consultant, conducted a Quality Assurance Review site visit. The review was continued on November 5, 2004 with the addition of Judy McGibbon, Purchased Care Analyst. The results of the review were addressed in a Quality Assurance Report (report), completed on December 2, 2003 (see attached).

Several areas of contract and policy noncompliance were noted in the report resulting in a recommendation to enact a moratorium on new placements. Teen Ranch was advised that a corrective action plan was required and that the moratorium would continue until Family Independence Agency (FIA) had received and approved the corrective action.

During the site visit, and while the Purchased Care Division (PCD) was completing the report, information was obtained from residents, Teen Ranch brochures, a local FIA office, and the Department of Consumer and Industry Services. This information suggest that Teen Ranch may be programming was improperly incorporating religious teachings into the daily

activities and treatment plans of youth The information obtained includes the following:

- Seven youths reported being required to participate in religious services
- Three youths specifically stated that they would "lose points" if they did not attend and participate in religious services.
- One youth stated that he was "placed out of program" and required to do "criteria" for not participating in religious services.
- One youth reported that she was required to attend "The River" which she described as consisting of singing six Christian songs and watching a skit put on by a pastor and Teen Ranch staff.
- A Teen Ranch brochure that discussed "The River" describes it as a "powerful tool for our youth as well as an important part of the overall Teen Ranch Treatment program." The brochure further states: "The River is a healing program designed to guide youth in discovering God's power in helping them overcome life's difficulties"
- Teen Ranch referral information states the following: "The River is a place where youth can: Deepen their relationship with Jesus Christ... . Each youth will be expected to participate as a part of their treatment here at Teen Ranch."
- On 11/07/03, PCD received a complaint from a local FIA office alleging that a female ward at Teen Ranch was forced to attend a church with her group where "they speak in tongues and touch you on the forehead". This complaint was referred to the Department of Consumer and Industry Services, Bureau of Family Services for investigation.
- On 12/04/03, the Department of Consumer and Industry Services, Bureau of Family Services, received

complaints from a youth and the youth's parent that a therapist at Teen Ranch repeatedly interjected religious issues into therapy with the youth. The Bureau substantiated licensing noncompliance. (See Attached Licensing Report #2004C0115009)

As PCD was unable to thoroughly review religious practices, technical assistance was provided (see page 12 of the report). Note: The purpose of technical assistance is to make agencies aware of potentially noncompliant aspects of their program and allow them an opportunity to enhance or modify programming, thereby ensuring contract compliance.

On December 2, 2003, Teen Ranch submitted a corrective action plan. The plan did not adequately address all of the cited contract/policy noncompliances.

On December 16, 2003, I completed a written response to the plan, detailing the areas that did not adequately ensure on-going compliance. Further, my response again addressed concerns about religious practices within Teen Ranch, stating the following:

> "The CAP indicates that youth are not required to participate and that youth are not consequented for choosing not to participate. It will be essential for the agency to carefully monitor the practice of its employees relative to religion. Note: It is not only improper to force youth to participate in religious practices but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans."

On December 17, 2003, PCD and Teen Ranch met to review the corrective action plan, using the December 16 letter as a guide for the meeting. A discussion of religious practices and the Family Independence Agency's position related to the issue occurred. Your response was that Teen Ranch was founded on the premise of religious beliefs and that the organization would not discontinue incorporating such beliefs into the activities of youth in placement and their treatment plans.

At the conclusion of the December 17 meeting, I requested that Teen Ranch submit a further amended corrective action plan, as well as provide information related to the religious practices of Teen Ranch.

We received your amended corrective action plan on December 29, 2003, which states:

> "The mission statement of Teen Ranch states, 'providing to young people and families through life changing relationships and experiences from a Christian perspective.' This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not 'force' youth to attend religious services although it is encouraged and we believe to be a part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal

> academic study time (if desired), letter writing home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care"

FIA acknowledges the important role that private agencies play in providing quality service to Michigan's youth and families. We respect the fact that many organizations are faith based and their beliefs serve as solid guides in their work with children and their families. Agencies may choose to incorporate spiritual elements into programming. However, providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities.

Public Act 172, section 220 (1) provides that:

> "In contracting with faith based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity,

including sectarian worship, instruction, or proselytization."

So too, the First Amendment to the Constitution of the United States, as well as Article I, Section 4 of the Michigan Constitution, require the separation of church and state.

FIA is supportive of faith based agencies that practice the general principles of respect, responsibility to others, honesty, and compassion. These principles are integral components of any number of organizations. The incorporation of faith specific tenets into treatment is not permitted by state and federal law. Youth may not be coerced into participating in religious activities.

FIA is sincerely interested in continuing the contractual arrangement that we have enjoyed with Teen Ranch. However, if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium. As always, I remain available to provide you and Teen Ranch with assistance.

Sincerely,
/s/
Debora Buchanan,
Manager Purchased
Care Division

cc: Musette Michael
Kathryn Fehrman
Karen Smith
Contract File

## POLICY AND PROCEDURE DIRECTIVE
## JULY 29, 2004
## MARLETTE, MICHIGAN, U.S.A.

Over the past several months, Teen Ranch's historic, consistent posture on the voluntary nature of its Christian programming has been called into question. The Board of Trustees of Teen Ranch feels it appropriate to publish this Directive as a means of reaffirming the long-standing policy of Teen Ranch pertaining to religious activities, and to clarify certain procedures to be observed in implementing these policies.

These procedures are not out of keeping with Teen Ranch's traditional approach, but are not augmented by federal and state statutory authority that make clear the rights and responsibilities of all concerned.

Teen Ranch fully embraces these statutory enactments, and intends to take a leading role in facilitating their full application.

For more than three decades, Teen Ranch has held the position, expressed in the motto, *"Nobody gets here by accident; we keep no one here against their conscientious will; we hold no religious prisoners."*

Nothing that follows will be inconsistent with this tradition.

Teen Ranch is surely a committed, unapologetic, Christian institution. We believe in and serve the Lord Jesus Christ. We praise His Holy Name. We live and thrive in the exercise of His great mercy.

We also fully recognize that no one can legitimately come to Christ by duress. Hence, forced conversions never have and never will take place at Teen Ranch. The action of grace on the human soul is something we can all hope for, pray for, and

encourage. But grace is a gift of God Himself, and His means of dispensing it are not subject to our meddling. Now, then, and always, we will openly proclaim our devotion to Our Lord, praise His Name, and teach of His greatness. We will continue to respect His right to call who He chooses when and how He chooses, and the right of all men to heed – or refuse to heed – this call in the exercise of their free will.

The procedures set out below are designed to make this policy and commitment crystal clear, so that all may know how to behave and how to react to those situations where the vision and commitment of the Teen Ranch board, staff, and volunteers, and the vision of our residents or prospective residents diverge. This procedure carefully and respectfully serves the rights and interests of all concerned, and accords each participant the dignity due a beloved creature of God.

Not coincidentally, federal and state statutory directives, in this instance, are congruent with these principles.

Finally, with the full and unanimous backing of the Board of Trustees, these procedures are truly a Directive, not a set of guidelines, and certainly not a suggestion. They will be enforced diligently and sternly. Therefore, nothing in this Directive shall serve as an invitation to improvise.

**********

## I. PRE-APPROVAL PROCEDURES:

This portion of the Directive deals directly with actions to be taken by Teen Ranch personnel once Teen Ranch first receives notice of a potential placement. The purpose, obviously, is to make a clear disclosure of the Christian character of Teen Ranch and the Christian nature of some of our programs.

such that the prospective placement, and his/her parents, guardians, caseworker, and/or lawyer can make a free, non-coerced, informed decision as to whether to pursue the placement. Understandably, this disclosure may cause a few placements to reconsider, and choose to go elsewhere. So be it.

More importantly, those that do come to Teen Ranch will certainly know well-ahead of time, what will be expected of them, and what they can expect – the preferable state of affairs since we have no intention of "sneaking up on" anyone in our programs. With that purpose in mind, what follows is the Teen Ranch pre-placement protocol:

A. Whenever any inquiry is received, regardless of the source, by any Teen Ranch employee regarding the potential placement of a youth at Teen Ranch through any governmental entity, the employee shall inform the Admissions Director[1] of the name, address, phone number, fax number, e-mail address, and status (parent, guardian, caseworker, lawyer, etc.) of the inquirer, and other pertinent information concerning the prospective youth, to be done as soon as possible after receipt of the inquiry and, in any event, within 24 hours.

B. The Admissions Director will convey, via the swiftest means available, the Pre-Admission Packet to the inquirer. This Packet consists

---

[1] Specific staff positions mentioned or described throughout this Directive, such as "Admissions Director" or "CEO," refer to both that particular person and, in the case of expressed delegation of authority, to that person's direct designee. This applies in particular to emergency situations, vacancies, vacations/sick leave, times of unavailability, and the like.

of 1.) an explanatory letter from the Admissions Director, and 2.) a disclosure document authored by Teen Ranch describing the Christian character of Teen Ranch and its program. These documents are designed to include space for the youth, his parent/guardian, and any relevant caseworker to sign, evincing receipt and understanding of the disclosure and the willingness of the youth to participate in the Teen Ranch program. The explanatory letter also serves to inform the reader that no **further action will be taken by Teen Ranch to facilitate this placement** unless and until the disclosure form is returned to Teen Ranch, signed by all appropriate persons, and signed by the youth, in particular.

C. If the disclosure document is returned, signed by the youth and all other appropriate persons, the standard admissions process will continue. If any questions or concerns are expressed by the inquirer, those shall be referred immediately to the Admissions Director for response.

D. To ascertain the status of the prospective placement, the Admissions Director will follow up on any disclosure forms that are not returned, or returned unsigned, in a reasonable period of time.

E. A copy of the fully executed disclosure document, and explanatory letter will be made a part of the youth's permanent file.

Any deviations from this protocol must re pre-approved, in writing, by the CEO, with a detailed explanation of the approved deviation, and the rationale. The CEO then shall update this Board of the deviation at the next regularly scheduled board meeting where the Board, in its authority, retains the ability to overrule, modify, deviate, or approve any such changes.

It must be stressed that, both out of legal considerations and out of our own commitment to Christian charity, it is vital that those who consider Teen Ranch as a residential placement facility be given a full, fair description of our program, its Christian orientation and its mission. The potential placement then is equipped to make an informed, free, non-coerced decision to participate.

In simplest terms, Teen Ranch is committed to see that **"nobody gets here by accident."**

## II. ADMISSION PROCEDURE.

The purpose of Part I ensures that, even before a youth arrives at our door, Teen Ranch has taken all steps reasonably possible to fully inform the youth and the youth's representatives of the Christian character and nature of our facility and program. Moving on from this point in the placement process, Teen Ranch intends to make clear to the youth that, at any time during his/her stay at Teen Ranch, if the youth makes a conscientious determination that he/she no longer wishes to participate in the program of Teen Ranch due to its Christian character, he/she shall have Teen Ranch's full cooperation in relocating to a non-religious facility, or a facility more in line with his/her personal religious beliefs.

It is this Board's expressed intent to ensure that residents of Teen Ranch are participating in our program freely and voluntarily. We also recognize that both federal and state law provides these youth with the right to *demand* relocation, if they form an objection to the Christian character and attributes of our program.

Not only will Teen Ranch obey these laws, we embrace them.

Therefore, we shall ensure each incoming youth is properly advised of the rights these statutes accord them, and of Teen Ranch's absolute commitment to facilitate the youths' exercise of these rights. This will happen immediately as the youth arrives on campus as part of our admissions procedure. Therefore:

A. During the check-in portion of the admissions process, the Teen Ranch staff conducting the admission shall provide each incoming youth, and any parent/guardian/caseworker/lawyer accompanying him/her with a "Statutory Rights Advice Form" for the youth to read and countersign prior to the youth's transport to his/her accommodations. The staff shall request the signature of the youth and the accompanying adult(s), if any, and allow each to retain a copy. The signed Advice Form shall be made part of the youth's permanent record. *There will be no exceptions to this requirement.*

B. Once, and only if, Step A above has been completed, the remainder of the admissions process shall continue.

C. If the youth, upon reading the Advice Form, expresses any desire to be relocated, the admissions process shall cease immediately, and the CEO of Teen Ranch shall be notified immediately to ascertain the status of the youth's preferences and to facilitate relocation, if that is demanded. *Under no circumstance is the staff to attempt to dissuade the youth of his/her desire to relocate, nor is it the duly, obligation, or inclination of Teen Ranch to do so.*

The purpose of this protocol is two-fold. First, it is a failsafe device to verify that the youth is actually willing to participate in the Teen Ranch program. Second, it is designed to make clear to the youth that he/she retains the right to be relocated if, at some future time, his/her conscience dictates. *This is not, as some may think, an invitation for the youth to "pick and choose" what he/she will do.* It is serious business of acknowledging each youth's statutory rights, and rights as a child of God, endowed with free will.

Our mission is to help these youth mold their free wills. Our Mission is *not* to subvert that will. **"Nobody stays here against his conscientious will."**

## III. OBJECTION POLICY & RELOCATION PROCEDURE.

This aspect of the Directive governs what Teen Ranch shall do if ever a youth 1.) objects to individual religious activities while at Teen Ranch or 2.) expresses an objection to the religious nature of Teen Ranch to any Teen Ranch staff. In reference to number two, such objection triggers an immediate obligation on the part of the placing agency to provide

non-objectionable services, accomplished by transferring the youth to an alternative provider.

The Board of Teen Ranch regards this right to object as the legal right of every resident, and a right granted to each youth not only by Congress and the Michigan Legislature but by his/her Creator.

It is clearly not our place to deny this right, however ill-advised we may consider its exercise to be.

Surely, we hope to convert the wayward youth with whom we come in contact to the knowledge of and devotion to Christ Jesus. We also know that no such meaningful conversation can take place if coerced by man. This is why church attendance, prayer, Bible study, and the like has always been encouraged, never mandated, at Teen Ranch as part of an effective treatment program, where other alternative activities then have been provided for the youth such as homework, letter-writing, or other productive personal or organized activity in a designated common area.

Regardless, youth at Teen Ranch are never to be rewarded or disciplined based on whether or not they choose to participate in religious activities, although behavioral problems at such activities will be consistently handled regardless of the fact that the activity happens to be religious in nature.

In our 38 years of experience, individuals who feel forced or coerced into such activities soon grow to resent the experiences we whop and pray they will grow to appreciate, thus defeating the very purpose of the activity, specifically, and the mission of Teen Ranch, in particular.

However, recognizing that Christian habits are evident in residential life at Teen Ranch, exemplified by mealtime prayers, the employ of a privately paid chaplain, "The River" program, or reading aloud from the Bible at "lights out," these habits may on specific

occasions clash with the conscientious will of an individual youth.

We do not believe the mere fact a youth chooses to take up residence at Teen Ranch limits their religious choices, which would circumvent their free will under the umbrella of God's grace. Thus, youth objecting to participate in such activities are not required to participate and may either sit quietly in observance or, if they prefer, excuse themselves to another location of relative close proximity.

In the specific case of church attendance, individual youth wishing to participate in religious services of a differing faith shall, *at a minimum*, be allowed transportation to alternative religious services by the youth's parent(s), guardian(s), or otherwise pre-approved adult visitor.

While these procedures have no intention to circumvent the importance of the youth's prior informed consent or the "opt out" procedures below, if these or similar actions pertaining to specific religious activities *under the discretion of Teen Ranch* are insufficient to resolve the youth's objection, the youth's consistent objections shall be treated as an objection to the religious character of Teen Ranch and relocation procedures shall begin, as outlined below:

A. If any youth tells any staff member that he/she (as opposed to a different youth who has not so expressed him/herself) has developed an objection to the religious character and program of Teen Ranch, and wishes to be relocated, the staff member shall immediately report this request to the CEO of Teen Ranch, and take no further action with regard to the youth. The staff shall refrain from any discussion of the

matter with the youth, except to inform the youth that his/her request will be brought to the attention of the CEO for further, immediate action. **No staff shall attempt to dissuade the youth in anyway.**

B. If any youth's personal religious beliefs cannot be reasonably accommodated, such as outlined above, the same policy and procedure applies and the request(s) shall be treated as an objection to the Christian character of Teen Ranch.

C. The CEO, immediately upon receiving the report referenced in Step A, shall inform the youth's caseworker, parent(s), and/or guardian of the request, after having met with the youth to ascertain that, in fact, this is the youth's desire. The CEO will inform the caseworker, parent, and/or guardian as the case may be that Teen Ranch will await their further instruction. If no further instruction is forthcoming in 2 days, Teen Ranch will take whatever steps are legally appropriate, including petitioning the relevant Court, to verify the youth's request and to facilitate relocation, if it is so verified.

D. The CEO shall keep a detailed, written record of each request, the steps taken in response by Teen Ranch and others, and shall retain the record as part of the youth's permanent file.

E. If the youth's caseworker confirms the request and desire for relocation, each and

every Teen Ranch employee involved shall fully cooperate in and facilitate the relocation. If the appropriate adult (caseworker/parent/guardian/lawyer) notifies Teen Ranch that the relocation request is false, or has been retracted, the CEO shall confirm this event in writing to the adult, and retain a copy of the confirmation in the youth's permanent file. *No penalty or negative consequence shall be applied to a youth who exercises his/her statutory right to relocate but, for any reason, chooses to remain at Teen Ranch following the initial request or demand.*

As has been repeatedly set forth, and as has been the policy of Teen Ranch for more than three decades, Teen Ranch is an overtly, non-denominational Christian facility with a fully Christian worldview. We hope to touch and improve the lives of the youth we encounter and surely welcome their conversion to Faith in Christ, or a deepening of their pre-existing Christian Faith.

We also know that coercion is not a tool of conversion, and force is not an implement of grace. Congress and the Legislature have acknowledged what we as Christians already know: it is wrong to force a conversation on anyone, and wrong to deny them the right – given to them by God – to turn their back on His calling. Hence, Teen Ranch shall meet and exceed the requirements of law when it comes to allowing those who, for conscientious reasons, wish to be relocated.

While this right may not be fully appreciated by others, it certainly does not grant them the right to regulate individual activities or eliminate them

altogether. We will not distinguish ourselves from our critics by emulating them. Hence, we will force no one to remain at Teen Ranch who conscientiously objects, evidenced through a variety of ways, to the Christian character of this facility and program. Stated another way, **"we keep no religious prisoners."**

**********

CONCLUSION

This Directive contains certain particulars that have not been published or formalized before, but adheres to the same principles and practices that Teen Ranch has observed for 38 years, and then some. This Board has approved it for immediate publication and full implementation by August 1, 2004.

There will be no exceptions.

Any violation of, or failure to comply to, any aspect of these procedures shall be grounds for progressive discipline of the guilty employee(s) and may, in a particularly grievous instance, be grounds for immediate termination.

It is true that many of these provisions coincide with certain legal requirements. Certainly, the positive law compels our obedience. More to the point, this Directive responds to the dictates of God's own Law concerning His desire that His creatures know, love and serve Him of their own free will, and that each of His creatures be responsible for the exercise of this free will. As such, in no way does this Directive, and the procedures called for in it, detract from our mission.

**As a Christian facility, these laws *are* our mission.**

Confirmed with unanimous consent, this twenty ninth day of July, in the year of Our Lord, Two Thousand and Four.

| | |
|---|---|
| /s/ Dr. Robert Brengel | /s/Dr. Clifton Clendenan |
| /s/ Loren Epler | /s/ Steven Harms |
| /s/ Dr. Thomas Jackson | /s/ Verlin Morgan |
| /s/ Mitchell Nichols | /s/ John Shelton |
| /s/ Dennis Squires | /s/ Andrew Trotogot |
| /s/ Matthew J. Koch, CEO | /s/ Mitchell E. Koster, COO |

[Text taken from Teen Ranch website found at http://www.teenranch.com/mission.asp]

[Illustrations Omitted]

**Vision**
For the character of Jesus Christ to be manifest in every individual, family and community throughout the world.

**Mission**
Providing hope to young people and families through life changing relationships and experiences from a Christian perspective.

**Theology of Mission**
A ministry of reconciliation through evangelism, discipline, and social responsibility.

**Core Value**
*People:* We are committed to people for all are valued of God. Therefore, we respect and honor each individual as we fulfill our mission.

*Truth:* We are committed to truth revealed by God as the absolute foundation for the accomplishment of our mission.

*Integrity:* We are committed to integrity through responsible actions and accountability in lifestyle, management, and leadership in the accomplishment of our mission.

*Excellence:* We are committed to excellence which demonstrates the highest quality in all aspects of our mission.

[Text taken from Teen Ranch website found at http://www.teenranch.com/residential.asp]

[Illustrations Omitted]

Since 1966, Teen Ranch has provided fully licensed, state approved placement facilities for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17.

Residential Care provides three distinct models to meet the enormous challenges of today's youth. Each model is designed to meet the children's needs through:

- Emotional and psychiatric counseling by trained and certified therapists
- An educational program focused on improved literacy
- Vocational programs concentrating on skilled trades
- Physical health and nutrition
- Spiritual reconciliation through the grace of God.

**Welcome to Teen Ranch**

---

This is undoubtedly a difficult time in your life. Your consideration of Teen Ranch did not come lightly, and it is our goal to make your time and your child's time with us comfortable, effective, and an experience that will never be forgotten.

Included in this booklet is a wealth of information for us to begin our journey together. I trust you find it useful and will thoroughly review the information prior to your child coming into care, as well as referring to it periodically during the time of treatment.

Teen Ranch is a unique ministry, one developed for the sole purpose of changing the lives of children and developing a closer relationship with Jesus Christ. This path we embark upon will be intense, emotional, sometimes frustrating, yet ultimately rewarding.

I look forward to walking along with you and your family in this journey.

In Christ,

/s/

Matthew J. Koch
Chief Executive Officer

## Table of Contents

Teen Ranch Statements of Purpose

Your schedule at the Ranch
Tab 1

Intake Checklist Tab 2

Clothing Inventory Tab 3

Education Policy and Waiver Letter Tab 4

Youth/Parent Handbook Tab 5

Your Key Team Members Tab 6

Map/Travel Information Tab 7

Financial Information & Financial Aid Tab 8

Policies and Procedures Tab 9

Testimonials Tab 10

Frequently Asked Questions Tab 11

Referenced Materials Tab 12

## Teen Ranch Statements of Purpose

---

### The Vision

[Illustration Omitted]

For the character of Jesus Christ to be manifest in every individual, family, and community throughout the worlds.

### The Mission

Providing hope to young people and families through life changing relationships and experiences from a Christian perspective.

### Theology of Mission

A ministry of reconciliation through evangelism, disciple-ship, and social responsibility.

### Core Values

People: We are committed to people for all are valued of God. Therefore, we respect and honor each individual as we fulfill our mission.

Truth: We are committed to truth revealed by God as the absolute foundation for the accomplishment of our mission.

Integrity: We are committed to integrity through responsible actions and accountability in lifestyle, management, and leadership in the accomplishment of our mission.

Excellence: We are committed to excellence which demonstrates the highest quality in all aspects of our mission.

## History of Teen Ranch

---

**One day, almost 50 years ago. . .**
Two young men named Joe Koch and Ray Clendenan took a group of boys experiencing trouble in school camping for a week. Part of Youth for Christ, the two men shared with the boys, played with the boys, hiked and camped with them, prayed and cried with them.

On the way back from the cabin on the small northern Michigan lake, Joe turned to Ray and said, "We really made a difference in these boys' lives this week. What would happen if we could spend more time with them?"

That is when the dream of Teen Ranch began.

Since that time almost half a century ago, Teen Ranch has grown to include 3 homes for children, a large vocational/recreational facility, a high ropes course with a 50 foot climbing tower, and a core group of experienced, professionally trained staff dedicated to the discipline necessary to help children and families struggling to survive in a difficult world.

Over this time, Teen Ranch has impacted the lives of almost 10,000 children, providing hope to these young people and families through the life changing experiences and the relationships they developed at the Ranch—all through a distinctly Christian perspective.

The Lord has been abundantly faithful to the Ranch, remaining committed to its purpose through the good times and through the rough stretches. We look forward to you and your family becoming part of this worthy organization, as we open a new chapter in the history of Teen Ranch.

**Your schedule at the Ranch**

---

First Sunday

| | |
|---|---|
| 10:00 | Welcome and Sign-In |
| 11:00 | Worship |
| 12:00 | Lunch |
| 1:00 | Presentation |
| 1:30 | TREK |
| 3:30 | TREK Debriefing |
| 4:00 | Parental Departure |
| 5:00 | Dinner |
| 6:00 | Youth Orientation |
| 7:00 | Light Interaction |
| 8:00 | Showers |
| 9:00 | Journals and Private Devotions |
| 9:30 | Lights Out |

Week Days

| | |
|---|---|
| 6:00 | Awake, Hygiene, Breakfast, Room Chores + |
| 7:30 | Group Devotions |
| 8:00 | School/Individual Therapy Sessions |
| 10:00 | Hand On Experience/Community Service |
| 12:00 | Lunch |
| 1:00 | TREK |

| | |
|---|---|
| 3:00 | Debrief/Group |
| 4:00 | Light Interaction |
| 5:00 | Dinner |
| 6:00 | Light TREK |
| | |
| 8:00 | Showers |
| 8:30 | Journals and Private Devotions |
| 9:30 | Lights Out |
| 9:45 | Late Night |

Saturdays

| | |
|---|---|
| 6:00 | Awake, Hygiene, Breakfast |
| 7:30 | Group Devotions |
| 8:00 | House Chores # |
| 10:00 | Off Campus Experience (Packed Lunch)* |
| 3:00 | Return to Campus & Debriefing |
| 4:00 | Light Interaction |
| 5:00 | Dinner |
| 6:00 | Light TREK |
| 8:00 | Showers |
| 8:30 | Journals and Private Devotions |
| 9:30 | Lights Out |

Sundays

| | |
|---|---|
| 7:30 | Awake, Hygiene, Breakfast, Room Chores + |
| 9:00 | Church |
| 1:00 | Lunch |
| 2:00 | Family Visit/Organized Activity |
| 5:30 | Parental Departure |
| 6:00 | Dinner |
| 7:00 | Light Interaction |
| 8:00 | Showers |
| 8:30 | Journals and Private Devotions |
| 9:30 | Lights Out |

Graduation Day

| | |
|---|---|
| 7:00 | Awake, Hygiene, Breakfast |
| 8:00 | Goodbye Devotions |
| 8:30 | Pack Up |
| 9:00 | House Chores # |
| 11:00 | Get Ready |
| 12:00 | Lunch |
| 1:00 | GRADUATION! |
| 3:00 | Departure |

* Off Campus Experience may include attendance at a sporting event, bowling, ice-skating, sledding, hiking, lumberman's camp, Frankenmuth, canoeing, or similar type activities.

+ Daily Chores include making the bed, tidying up the bedroom and living area, folding/putting away clothes, meal prep, dishes, etc.

# Other Chores may include bathroom cleaning, kitchen duty, vacuuming and moping, dusting and polishing furniture, window washing, lawn mowing/trimming, maintenance projects with staff, cleaning the Vocational Building, etc.

Frequently Asked Questions

**What is Teen Ranch?**

Teen Ranch was founded almost four decades ago as a tool to minister to troubled young people and their families.

Teen Ranch is a private, non-profit, non-sectarian, yet distinctly Christian residential treatment facility. It is fully-licensed by the state of

Michigan, demonstrating complete compliance for safety and facilities for the programs your child will participate in—everything from the qualifications of staff to proper fire safety procedures.

**What is the Mission of Teen Ranch?**

Teen Ranch's mission is *"to provide hope to young people and families through life-changing relationships and experiences from a Christian perspective."*

How does this statement move from theory to practice? Through two words: *hope and relationships.* By *hope*, we refer to the hope and promises only found through the love and redeeming power of Jesus Christ. This new found hope found in Christ offers children a realization that they are no longer living just for themselves, but they may have a higher calling and responsibility to One much greater.

The basis of everything we do revolves around building stronger *relationships*—youth to youth, youth to staff, youth to parent, and staff to parent. And, of course, everyone building a closer relationship to Jesus Christ. Through these solid relationships based on trust, staff and parents are granted more authority and credibility in the eyes of the struggling child, being allowed to better communicate with this child the truly important things in life.

**What is "residential treatment?"**

When teenagers demonstrate self-destructive behavior, often their best course of treatment is to remove them from their current environment, placing them in an alternative loving and caring atmosphere.

This atmosphere—24 hours a day—must be designed to allow the child to re-evaluate past

decisions, equip them with the ability to make better judgments, and enable the family unit to resolve future conflicts.

**Where is Teen Ranch located?**

Teen Ranch is located in the heart of Michigan's "Thumb" region. Seventy miles north of Detroit, Marlette is a rural farm town with rolling hills, an abundance of wildlife, and a community of traditional conservative values. (See enclosed map)

Due west of Marlette is the Teen Ranch Clendenan Campus, named after Teen Ranch founder Ray Clendenan. One of three ranch-style residences will be home to your child for the duration of their stay. A picturesque piece of property, the campus also boasts a large vocational building housing, among other things, a full court gymnasium. Swimming facilities are available in the warmer months and, of course, Teen Ranch's TREK course and 50 foot climbing tower is the most recognizable fixture.

**How do I know if my child needs to be at Teen Ranch?**

Teen Ranch will evaluate your child's needs prior to intake. Our seasoned staff of Master's and Doctoral level staff can help you determine the proper course of treatment for your child. We are ethically and legally bound to proscribe the best course of treatment for your child—be it at Teen Ranch or another course of therapy altogether.

**Why is my child exhibiting self-destructive behavior?**

Oftentimes, children are "grieving," but their behavior may manifest itself in delinquent activities or actions: poor school performance, rebellion, substance

abuse, depression. Grief may come from a host of experiences during the life of your child, such as death of a loved one, divorce, separation from friends or family, or frustration due to uncontrollable events.

The activities your child will undertake at Teen Ranch are designed to uncover the real reason why your child behaves the way he/she does, not simply trying to alleviate symptoms. Teen Ranch searches for the core problem, then provides alternative outlets to funnel "grief" other than through negative behavior.

**What type of activities will my child be participating in?**

Every activity we do is designed to build relationships, as well as offer insight to your child about their life's direction. These activities include:

- TREK adventure-based activities
- High-ropes adventures to build courage, trust, and teamwork
- Low-ropes adventures which offer insight into decision-making
- A work program teaching skilled trades
- Regularly scheduled off-campus outings

**What will be required of me, as a parent/guardian?**

From our experience, the problems exhibited by your child is not 100% their fault. You may need to realize that the "problems" may be the environment in which he or she is being exposed to. What the child did to get here is not the *real* problem. Most of the time their negative actions are *reactions* to others' unhealthy *actions*. Dealing with these issues will be done in a variety of manners:

- Teen Ranch strongly recommends the parents' involvement in family counseling in their local area.
- There will be required homework assignments for you while your child is at Teen Ranch.
- Sunday youth/parent visits to review the last week's progress, look forward to the coming week, and spend positive time together in an alternative setting.
- Teen Ranch encourages utilizing other Christian organizations-including your local church to help during your child's care and in their after-care program.

We recognized there may be severe financial or travel restrictions on some of these requirements, yet we also strongly desire that your child's treatment, your investment, and your family's experience with Teen Ranch will be as beneficial as possible.

**How long will my child live at Teen Ranch?**

The typical stay for a youth is 4 weeks. We recognize, however, that it is not always possible to build strong enough relationships in that brief period, nor offset possibly years of negative behavior in these few days.

Nevertheless, your child will leave Teen Ranch equipped with the proper tools to reach their goal—whatever that goal may be.

Following the completion of the 4 weeks, you may feel that the Teen Ranch Treatment Team has just begun to touch the surface of the core problems facing your family. If this is the case, your child is welcome to stay an additional session (pending availability), or as many sessions you feel adequate to fully meet the needs of your child.

Moreover, Teen Ranch may offer "refresher courses" throughout the year for graduates of the program. This may include weekends or weeklong stays, or maybe even extended trips to other sites. Once you come to Teen Ranch, you become part of our extended family. We fully intend that your time with us be as long as necessary—not a day longer.

**Where will my child go to school?**

It must be realized that formal education is not the primary goal of this program. Our primary goal is your child's rehabilitation, and their education must complement his/her therapy. What good is a high school education if your child's behavioral needs are never met?

Each day the child has regularly scheduled educational time. The curriculum will depend upon your child's current schooling and the homework provided by you and your child's teachers. Each week you will be asked to provide, through your current school, adequate coursework/homework for your child to complete each day.

To aid you in this area, you will be assigned a Teen Ranch Educational Coordinator whose duty is to ensure smooth transition from and back to school, acting as a liaison between the child, the family, and the school, and to adequately meet the needs of the child's education so that the child does not needlessly fall further behind.

**In terms of personal items, what does my child need while at Teen Ranch?**

The only necessary item is appropriate clothing. We will provide our suggestions as to the type, styles, and number of each article prior to intake.

Additional items are recommended but not required, such as pictures, books, magazines, and a modest amount of personal spending money. Personal monies will be managed by the Teen Ranch Finance Department as outlined in the Allowance Procedures.

Certain things will be considered inappropriate as outlined in the Youth/Parent Handbook. Remember, this is not a summer camp but a place for intensive therapy and treatment.

All of your child's articles will be inspected at intake, following visits, and on regular intervals to prevent the possession of inappropriate or illegal contraband dangerous to your child and other children, or which may interfere with his/her treatment goals.

**My child has special medical needs. How are they going to be managed?**

Teen Ranch employs a Medical Specialist whose duty is to ensure the medical needs and physical health of all the children in care. Special medical needs must be communicated to Teen Ranch prior to admission and again at the time of orientation.

Teen Ranch is not a medical facility. If your child has extreme medical needs, such as anorexia or bulimia, or has severe developmental disorders, your needs may be better served at another facility. Teen Ranch will assist you in making an informed decision.

For medical emergencies, the town of Marlette has a regional medical center. The nearest Trauma center is in Lapeer, roughly 30 miles away.

**How do I keep in contact with my child during his/her stay?**

Contact between you and your child will be monitored through your child's therapist and treatment team. Your child's therapist will contact you on a regular basis to update you on your child's progress, as well as preparing you for regularly scheduled visits (usually on Sunday's) and other opportunities and assignments to actively partake in your child's treatment.

At the time of intake, you will be given contact information for your child, from their house's phone number to emergency staff cell phone numbers where they can be reached 24 hours a day.

The treatment goals of your child should be your first priority. Excessive direct contact between you and your child could be detrimental to this goal.

**What if my child runs away?**

Your child is at Teen Ranch *voluntarily*. If your child decides to leave, or you wish your child to be removed, there is very little that Teen Ranch can do legally to "force" him or her to stay.

Procedures are in place, of course, to make it disadvantageous to you and your child to discontinue participation prematurely.

If your child attempts to or successfully truants from Teen Ranch, policies explained to you during intake will be followed to communicate with you in determining the next appropriate action.

**My spouse/ex-spouse/child's other parent is opposed to my child being at Teen Ranch. What can I do?**

First, not everyone in your child's life will agree with your difficult decision to send your child to Teen Ranch. As long as these people *accommodate* the stay, and do not try to *interfere* with treatment, it is a situation Teen Ranch has great experience in handling. From this experience full and complete participation by every family member is quite rare.

Second, if another adult has rights over your child and wishes the child be removed—even temporarily—again there is little Teen Ranch can do to prevent this. It cannot be stressed enough, the entire family must be in voluntarily favor of the child's stay at the Ranch, or any member of the family can "pull" the child out at any time.

Third, if there are people who your son/daughter is not allowed contact with, you can indicate this on the proper Visitation/Contact Form. Attempts to illegally remove your child from care by, say, a non-custodial parent, is tantamount to kidnapping, and may be treated as such, up to and including using local law enforcement to protect your rights and pertinent court orders.

**If my child becomes violent, what procedures are in place?**

Teen Ranch has trained and qualified personnel with the ability to physically manage your child's possible violent behavior, when appropriate. Your child may be physically restrained if he or she is:

- A threat to him/herself
- A threat to others
- A threat to cause major property damage

If your child is ever physically restrained, the staff shall document the event with an Unusual Incident Report outlining the specifics of the situation and the treatment measures taken to deescalate your child prior to resorting to physical management. A Teen Ranch staff will also attempt to contact you at the next available opportunity to apprise you of the situation.

**Is Financial Aid available?**

Yes. Thousands of individuals and families throughout the country financially support Teen Ranch, believing this to be the best tool to help your child succeed in a difficult world. Their generous contributions to the Ranch, as well as your ability to finance your child's stay, may be able to reduce your monthly fee, or possibly defer all payment until after your child has left the care of the Ranch, among them:

- Low-credit/no-credit loans through *Patient Financial Services*
- A sliding-fee scale
- Scholarships from churches, business, and private individuals

In the Financial Information & Financial Aid section (Tab 8) is an application for financial aid. Upon receipt of your application, a Teen Ranch committee will review your application, objectively taking into account your personal financial situation as outlined in the application, then recommend specific strategies to assist in your tuition payments.

**Why Teen Ranch?**

Teen Ranch may be the very program that could change your child's heart. Although only God can truly change a person's heart, we know that God uses people as His instruments.

At Teen Ranch your child will receive the kind of environment that is safe, effective, based upon godly mentoring, and provided by Christian staff. Through the building of healthy relationships, the staff at Teen Ranch offers your child the insight he/she needs in order to make the positive changes toward a meaningful life—thus granting your child *the knowledge of being made in the Image of God, then equipped with the tool to become a Kingdom Builder.*

**Travel Information**

[Michigan Map Omitted]

Driving Directions

I-75 to I-69 East
North on M-53 (Van Dyke), Imlay City, Exit 168
22 Miles North of Imlay City
East on Marlette Road (4 miles)

**Teen Ranch Administration building located:**

4672 Marlette Road
Clifford, MI 48727
(989) 761.7511

**Airport Information**

**Flint (Bishop International Airport)**

Located at the junction of I-75 and I-69, the Flint International Airport is a quick, convenient "in and out" airport that many Detroit residents choose to use rather than the larger, more congested Detroit Metro. Teen Ranch highly

recommends Bishop Airport for your travel needs. It is approximately a 55 minute drive from Teen Ranch.

**Detroit Metro**

Located West of Detroit, Metro Airport serves virtually all air carriers. It is a major hub for Northwest Airlines. Metro Airport is a 2 ½ hour drive from Teen Ranch.

**Marlette Airport**

Not serving commercial travelers, the village of Marlette has facilities for your private aircraft. Call for details.

**Overnight Accommodations**

Teen Ranch recommends the Days Inn located in Imlay City for your travel comfort. It can be reached at 810.724-8005

Upon your request, we will arrange reservations for your convenience.

In addition, if overnight hotel stays are not financially feasible, Teen Ranch may have temporary housing available for your time with us, free of charge.

If your child requires ground transportation either to or from an airport, or within a reasonable driving distance, contact us directly to discuss logistics.

## Your Therapy Team

---

**Michael Hutchens, MA, MSW**
**Therapist**
Mr. Hutchens has been a therapist with Teen Ranch beginning in 1997. After growing up in Wheaton, Illinois, Mike attended Murray State University and graduated with a degree in Social Work, then continued his formal education at Asbury Theological Seminary where he received a Master's in Christian Counseling. He also has a Master's in Social Work from the University of Kentucky (Lexington).

Mike "The Coach", also teaches seminars focused on building stronger marriages, and is an adjunct professor with Spring Arbor University. He and his wife, Susan, are residents of Kingston, Michigan and have three sons, ages 15, 13, and 8.
EMERGENCY CONTACT: 989.529.0608

**John Morris**
**TREK Leader**
Mr. Morris has been with Teen Ranch for a dozen years, specializing in the adventure-learning component of therapy so integral to the Teen Ranch program. Mr. Morris uses his special gift of weaving Scripture and therapy into everyday activities of the children, adding unique insight for your child to overcome their daily struggles.

John, his wife and daughter live in Sandusky, Michigan.
EMERGENCY CONTACT: 810-648-2214

**John Diel**
**Team Leader**
Mr. Diel has been with Teen Ranch for 5 years and been in the role of leadership for the past two. He came to Teen Ranch after years as a successful licensed builder, feeling called to leave his business to go into full time ministry work. John coordinates the staff and youth activities, working closely with and leading the team to reach the treatment goals.

John and his wife Sue are residents of Marlette, and are also licensed foster parents through Teen Ranch.
EMERGENCY CONTACT: 989-233-4577

**David Aldridge**
**Work Group Leader & Facilities Director**
Mr. Aldridge and his wife, Dory, started with Teen Ranch almost 20 years ago as House Parents. Dave leads the children in work projects, both at Teen Ranch and in the community. These service-learning projects and voluntary work activities become integral to the treatment of the children. Working side-by-side with the children, Mr. Aldridge has a unique perspective on reaching troubled children, building relationships with the children and offering life's lessons in this environment.
EMERGENCY CONTACT: 989.529.0584

**Lind Perry**
**Medical Services & Education Coordinator**
The physical health of every child in care is the primary need for each Teen Ranch child. Mrs. Perry oversees the medical needs of the children in care by dispensing all medication and evaluating the psychiatric and medical needs of each child. Ms. Perry also is the liaison for academic questions and relaying homework assignments for your child. She is your contact for specific health related questions or concerns regarding the education for your child.
EMERGENCY CONTACT: 989-635-7351

**Terry Stark**
**Director of Finance & Information Technology**
Mr. Stark has been with Teen Ranch for 5 years, first as the Information Technology Director then utilizing his financial management ability to combine these services with the Finance Department. As chairman of the Financial Aid Review Committee, Terry is the team leader for questions regarding financial aid, working to make the care of your child as affordable as possible to you and your family.

The husband of a Deputy Sheriff, Terry was previously a small business owner and a consultant with a national information technology consulting firm. He is the father of a 10 year old son, and resides in Caro, Michigan.
EMERGENCY CONTACT: 989.233.4355

**Mick Koster**
**Chief Operating Officer**
Mr. Koster has been with Teen Ranch since 2001, being promoted to COO in 2003. Mr. Koster is the operational director for all of TeenRanch. Questions about policies, grievances, or concerns may be addressed directly to him.

Mick has a BA from Calvin College and a Master's in Public Administration from Michigan State University. He is also an adjunct professor of business at a local Christian college. He and his wife have two young daughters and reside in Oxford, Michigan.
EMERGENCY CONTACT: 248-939.0577

**Other Emergency Contacts:**

**Marlette Community Hospital** 989.635.4000
**Koch House:** 989-761.7041
**McClaren Regional Medical Center** 810.664.8511
**Moore House:** 989-761.7139
**Morgan House:** 989.761.7108
**Tuscola County Sheriff:** 989-673-8161
**Administration Office:** 989-761-7511
1.800.REACH 4-1

## Testimonials

---

**Rich S., San Diego (Teen Ranch 1970)**

*Dear Mr. Ray. Clendenan* [founder of Teen Ranch]:

*Hope this letter finds you in good health and the greatest of spirits. This letter is most unusual and I hope it doesn't come as too much of a shock.*

*I don't know if you remember me, but if I may help, back in the early years of Teen Ranch when Mr. and Mrs. Sampson were the house parents in building #1, I was one of the first to be with Teen Ranch as a young man. Shortly after building #2 was built, I moved in with Mr. and Mrs. Potter.*

*When I arrived at the Ranch I was, like most boys at that time, a ward of the court. My mother died when I was 8 and by the time I arrived at Teen Ranch my father had given up on me. It was a confusing time in my life, and you took me in with open arms and helped mold me into the man I am today.*

*With your help, guidance, and outlook along with the Samson's and Potter's, I ended up an asset, not a liability. I can remember as a young man going to your farm, picking up rocks in the fields, riding your tractor, and the many other activities you used to hold for us, like Halloween parties in your barn and many, many more. You took the time to work with each and every one of us. I think the one thing that has been with me for so many years was the fact that you treated me like I really was someone special, and you cared a great deal about each and every one of us boys.*

*To give you a summary of events, after I graduated from high school at Teen Ranch I enlisted in the Marine Corp. and ended up serving two tours in*

*Vietnam. After my honorable discharge from the Marines, I traveled the U.S. a great deal, finally settling down and furthering my education. I got into the field of construction in which I now own my own construction company. I have two beautiful daughters in which I am very proud of both of them.*

*For some strange reason in which I cannot explain, after leaving the Ranch I have never returned. However, Teen Ranch has never been forgotten and has always had a place in both my mind and heart. Now here it is 33 years lager and I never had the chance to thank you for your guidance and the learning experience I would never have received if I had not been with Teen Ranch.*

*Mr. Clendenan, from the bottom of my heart, I personally wish to say, "Thank You!"*

**Mike M., Pontiac, MI (Teen Ranch 1973-1974)**

*If it wasn't for Teen Ranch, I'd be dead right now.*

**Patty B., Jamestown, TN**

*I had a son that was at Teen Ranch in Marlette, and that was the best thing that has ever happened to him. This was some years ago, and my son is now 36 years old and has a wife and family. I know how you work there and the wonderful things that you can do to help children in trouble.*

[Text taken from Teen Ranch website found at http://www.teenranch.com/ceo.asp]

[Illustrations Omitted]

Dear Family,

I have an update to share with you regarding what is happening with Teen Ranch and our struggle with the State of Michigan. Before I do, I feel compelled to share some thoughts that are on my heart.

**First, let me express my sincere gratitude to all of you for faithfully responding to our needs over the past several months.** Your heartfelt response was overwhelming and a testimony to all of us at Teen Ranch. We realize that many of you gave above and beyond ... and many of you gave sacrificially. We feel a strong sense of responsibility to you as a donor and our friend ... and to God as stewards of all that He has entrusted to us.

**Secondly, let me reaffirm that our passion at Teen Ranch is to reach kids for Christ!** We are all about leading kids to Christ ... loving them unconditionally ... and cheering for them as their lives turn from a path of destruction to a path of life and hope for the future. **Our current struggles with the state and financially will not distract us from our passion and our mission!**

Finally, let me share our most recent updates with you. We have several reasons to be thankful and to be encouraged.

**The Alliance Defense Fund (ADF) has been an absolute blessing to us in providing excellent legal**

council. For many weeks, they tried numerous times to convince the State of Michigan Family Independence Agency (FIA) that their actions were illegal and violated both state and federal law, as well as the U.S. Constitution to no avail.

ADF prepared and filed a suit against the State of Michigan FIA on behalf of Teen Ranch. Literally ten minutes after receiving word of our suit, the State of Michigan FIA changed their unjustified legal position and lifted the moratorium!

FIA lifted the moratorium and Teen Ranch did not have to compromise its Christian Stand.

The federal judge presiding over our case is requiring FIA to appear in Court on March 24, 2004 to explain why it imposed a moratorium in the first place. We know it was because of our Christian stand and FIA was in violation of the law. We are praying that the truth will come to light.

This is great news! The state of Michigan FIA will once again place children at Teen Ranch where they have the opportunity to hear about our Lord. God if faithful and we thank Him for his victory!

We realize that our struggles are not over. We have only received a few calls for possible placement in the residential program since the moratorium was lifted and have not placed any children as of the date of this letter. We are hopeful that eventually they will come in.

**As we prayerfully considered all the events of the recent months, we have to believe that God is leading us in a new direction.**

**We are pressing forward with our plans of being able to offer services for children, youth and families through private non-state funding.** We are beginning the process of preparing the program outline and remodeling one of our existing homes. This privately supported program will be able to help families who are looking for a safe, loving, nurturing environment where their child can hear about the love of Christ and begin anew ... before any government agency becomes involved. It is our dream to be that place!

**We are stepping out in faith believing God has already spoken to many of your hearts.**

Please prayerfully consider a donation to Teen Ranch during this critical time and help us travel into a new era. You are playing a vital role in launching this new program, helping Teen Ranch through this financial crunch, and reaching many children and families for His Kingdom.

The remodeling of the first house for the new program is $75,000. Many have already helped, but we still have a need of approximately $60,000 to complete the project and open this new private funding home in June or July.

Our current need to meet our budget is $175,000. Just to show you how the Lord is working, last month our faithful partners gave approximately $75,000 of the $250,000 needed for this 3-month period.

As you can see, your gift of $1000, $500, $100, $50 and even smaller gifts add up when we put them all together.

**Many are calling, asking when our new program will open. Will you help us heed the call ... walk by faith with us ... and help Teen Ranch continue its ministry to children and families?**

Yours for young people and families
Matthew J. Koch, CEO

P.S. Please call Mike Bearden or myself at 1.800.732.2441 if you have any questions. We would enjoy talking and praying with you.

[Text taken from Teen Ranch website found at http://www.teenranch.com/ceo.asp]

[Illustrations Omitted]

***Helping Hurting kids... HIS purpose, our passion!***

Dear Family & Friends of Teen Ranch,

**Why does Teen Ranch exist? Why were people like Ray Clendenan and my father Joe Koch so passionate about helping troubled young people some 38 plus years ago?**

It was because they knew God could change children's lives ... and that He had a purpose and a plan for each one of these young kids ... and they knew God wanted them to do something about it.

Was it difficult to get started? You bet it was! Were their dreams launched at and challenged. Yes, and sometimes by people that were very close to them. Did they get discouraged? No! They knew God was behind it and that He was faithful. They persisted ... prayed ... worked hard ... invited others to join in ... prayed again and until finally one day in June of 1966 Teen Ranch began.

**Our purpose and passion to serve hurting children with the message of "hope" through Jesus Christ continues ... regardless of our relationship with the state of Michigan.**

Will it be difficult? You bet! We stand firmly, knowing God is faithful. He has not changed; He

wants Teen Ranch to continue ministering to troubled youth.

There are many families desperately in need of our help – families calling every week for Teen Ranch to help their troubled child.

Do you know a young person who is going astray? You see their life being pulled into darkness and you wish there were something you could do to help?

I don't think it would take very long to find a young person like this connected to our own lives. If you are like me, you say a prayer and maybe offer a word of encouragement, but then wonder "what more can I do?"

**There are few programs offering help and hope for hurting families and youth at an early stage of delinquency – prior to the court system taking control. When it comes to distinctly Christian programs like those at Teen Ranch, the number throughout the country is only a handful.**

We have a unique opportunity right here in Michigan to help families around the country running into roadblocks when it comes to finding help for their child from a Christian perspective.

**I say all this to announce that you can help these children right now! Teen Ranch, with the support of our faithful friends and partners is able to reach out to those who for so long were forced elsewhere! Teen Ranch is opening a private care Christian program for hurting kids to meets this need, prior to the state and the court's involvement.**

We have children waiting to enter our private care Christian program right now! We invite you to take this opportunity to make a difference in the life [*sic*] one of these children.

**You can help a child find "hope" with a gift of $1000, $500, $100, $50 or $25. Your gift of any amount is greatly appreciated.**

As you prayerfully consider the amount God would have you sow into the life of a child, please remember that our future rests in the hands of this next generation just entering adulthood.

Thank you for taking this wonderful journey with us.

Yours for young people and families,

Matthew J. Koch, CEO

Matt 25:40 – Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.

**Update: Our plight with the State of Michigan continues. Thank you for continued prayer support. We will provide updated information as our case progresses.**

[Text taken from Teen Ranch website found at http://www.teenranch.com/ceo.asp]

[Illustrations Omitted]

Dear Family,

It has been an interesting and soul searching past few months at Teen Ranch.

In short, **Teen Ranch has come under attack from the State of Michigan because of our ministry to reach troubled children for Christ.** All of us, I am sure, have been hearing stories about Christians being harassed by government agencies and bureaucrats. **It is happening right now, right here, at Teen Ranch.**

Let me explain.

Every year in late October, the Sate of Michigan Family Independence Agency (FIA) audits and inspects Teen Ranch to ensure it is a safe, effective place to send troubled youth. **For all these years, Teen Ranch has accepted children who are wards of the State – we feed them, we clothe them, we counsel them, we laugh and cry with them. All for the opportunity to talk to them abut the love of Jesus Christ and the joy of knowing Him.**

As a result of this investigation, FIA wrote to us in a document dated December 2, 2003 that, **"Private agencies under contract with FIA may not impose their religious beliefs on children in our care."**

The report continues, describing a program used at Teen Ranch called "The River:"

> *In [Teen Ranch's] most recent brochure, it is state [sic] that "The River is a healing program designed to guide youth in discovering God's power in helping them overcome life's difficulties." Another brochure states that "The River" is a place where youth can "deepen their relationship with Jesus Christ" and "come to the cross."*
>
> *One youth interviewed complained that she was forced to attend "The River," which she described as consisting of singing six Christian songs and then watching a skit put on by a pastor and Teen Ranch staff, followed by discussion.*
>
> *Teen Ranch needs to reassess their program to ensure it complies with FIA policy.*

Let me tell you about this "terrible" River program, or so the State alleges. **Two weeks ago, a young girl in our care made a decision for Christ directly because of this program!**

To say the least, this report from FIA was troubling to both me and the Board of Directors of Teen Ranch. We sought clarification from FIA, meeting with them in Lansing on December 17. They issued us another document to clarify the government's position on ministering to trouble children. This document states:

> It will be essential for [Teen Ranch] to carefully monitor the practice of its employees relative to religion. Note: It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious

teachings into the on-going daily activities of youth and their treatment plans.

Friends, we have two options.

The first option is to cave into the demands of the politically correct – compromising our mission **and our Christian values** for a few lousy dollars from the State of Michigan. This would be the easy path to travel down. This would be building our house upon the sand.

Or we can stand and fight. **We can stand strong and refuse to sacrifice what we know and believe to be right, trusting in God and His people to meet all our needs.**

**This is building our house upon the rock.**

**I wish we could fight this battle alone, but we cannot.** Now, more than ever before in the 37 year history of Teen Ranch, we need your prayers, your encouragement, and your financial partnership in reaching troubled children for Christ. **We hope you can commit to a monthly pledge** – be it for the entire year or over the next 3 months. **If you cannot support us every month, your one-time gift of $500, $100, or even $50 will do miraculous things in the life of a child.**

Any level of support you can give allows us to stand even stronger in defense of the principles we know to be true.

In Christ,
Matthew J. Koch, CEO

P.S. Please look forward to our next three monthly newsletters to hear our response to the State and learn more about our government's attack on this Christian ministry.

**Standing in Faith**
February 2004

Dear Family,

I need to begin this letter by sincerely thanking each and every one of you who have given so faithfully over these recent months. Your gifts, prayers and words of encouragement have given us added strength and determination to press on. Without you, we simply wouldn't be able to continue helping brokenhearted children transform their lives through Christ.

**As you are well aware from our last letter, we are in an on-going battle with the State of Michigan Family Independence Agency. Simply put, we refuse to compromise our faith base and what has been working so well for us for the past 37 years.**

The primary focus of our discussions with the State of Michigan Family Independence Agency (FIA) is regarding the Christian instruction and experience we offer the children in our residential care programs. The FIA has made its position very clear. It is not just about whether or not children attend religious services, it is about mentioning or talking about Jesus Christ at all.

**The FIA position is that, under no circumstance, should a discussion occur with a client of Teen Ranch**

**regarding Jesus Christ or any faith-based Christian experience. They are recommending that we accept this position. Those of you who know Teen Ranch realize that this request is simply not an option.**

The State FIA has put us on a moratorium, which means we cannot accept additional children in our residential program because we refuse to compromise our Mission statement of "providing hope from a Christian perspective" and our vision statement of "manifesting the character of Jesus Christ" to the children and youth in our programs.

**We have made it clear that we are more than willing to comply with the State FIA on other levels, but when they say we can never discuss Christ or our faith ... we simply cannot compromise! Children's lives and futures are at stake and we owe them more than that.**

There are more than 10,000 kids that have passed through the doors at Teen Ranch whose lives have been changed because of their time with us. We regularly hear from alumni and their statements have these commonalities.

**"I am so thankful for the time I spent at Teen Ranch, because it was at the ranch that I was introduced to Jesus Christ and learned about having a relationship with Him. Today, my family and I are in church and walking by faith with Christ. I have a job and I am an asset to society and not a liability any longer."**

**This is why we stand firmly on our faith ... based on Jesus Christ!**

Possibly, the Lord has put us in this position to set precedence for faith-based organizations across the country. This is an opportunity to bring our Christian heritage and our religious freedom to the forefront, and to remind the people of the United States that we are a blessed nation because of it.

Personally, this is the most meaningful cause that I have ever had the privilege of being a part of. This battle is the Lord's and **I am asking you to stand with us for the cause of freedom that all of us cherish, for the children of Teen Ranch, and most importantly for the cause of Christ.**

**As you consider a gift to Teen Ranch this month, please think about the Christian freedom that you enjoy... and the fact that there are many individuals in our own country that would love nothing more than to see it all disappear completely.**

In the next three months we must raise $250,000 to continue. This is almost twice as mush as we would normally need or receive for this same period. Please prayerfully consider your gifts to Teen Ranch over the next few months. A gift of $5000, $1000, $500, $100 or any amount over what you would normally give would be most appreciated.

**Your faithfulness in prayer and financial support to Teen Ranch has never been more significant in what it can accomplish for the Kingdom of God. May God richly bless you and may God bless His work.**

Yours for young people and families,

Matthew J. Koch, CEO

P.S. We are looking into the opportunities that present themselves in times like these. We are seriously researching the possibility of offering services for children, youth and families through private non-state funding. We are also doing our best to practice good stewardship with everything that God has entrusted to us. Please feel free to call 1.800.732.2441, email at hope@teenranch.com or click on our web site www.teenranch.com for more information.

THE RIVER

There is a cry in the hearts of young adults for radical intimacy and healing in relationships and for empowerment to live as the men and women they were created to be. At the same time, many young adults carve these things because they lacked (at least in part) intimacy and empowerment at home. Some carry with them the effects of abuse. Others began at early ages to make poor choices in relationships. As the standards for sexual behavior all but disappear in the broader culture, and many families are weakened or broken, healing, restoration and gut-level honesty become essential tools.

The River is an intense, healing group with a residential focus that deals with issues of sexual and relational brokenness. Many of the youth we deal with are experiencing a great amount of frustration in their relationships with family and others. -Issues such as abuse, insecurity, interrupted family dynamics, and specific sexual issues, keep them from making healthy, appropriate decisions in relationships. This is a program designed to change lives.

The River is a place where youth can:

< Deepen their relationship with Jesus Christ
< Get free to have healthy relationships
< Grow in a safe small group [Illustration omitted]
< Get help for the areas of pain in their lives
< Understand key relationships in their life (such as with parents)
< Be real about their life – the good, the bad, the past and the present
< Come to the cross
< Get rid of baggage

< Experience freedom

The River is connected with on-going treatment with the residential therapist and the on-line staff. The youth however, are allowed to maintain their treatment within the River and confidential. The [*sic*] are required to maintain the confidentiality of all other members in the River group.

Each youth will be expected to participate as a part of their treatment here at Teen Ranch. The River will also be a party of their treatment plan with an expected positive outcome. It is our hope that each youth will gain a better understanding of how their brokenness has affected the choices that they themselves have made as well as how their family dynamics may have played a part.

**The River**

The River is a healing program designed to guide youth in discovering God's power in helping them overcome life's difficulties. Cycling between houses every fourteen weeks, each of our youth is given an opportunity to complete this important program. By teaching relationship skills, avoiding involvement with the wrong people, overcoming addictions, and seeing hope and strength in God's involvement in their lives, The River is a powerful tool for our youth, as well as an important part of the overall Teen Ranch treatment program.

5. **Teen Ranch Level System**

The *Teen Ranch Level System* is based on the principle that youth are greatly influenced by their

peers. Often, this peer influences has been a very negative and destructive part of a youth's life. The *Teen Ranch Level System* uses the power of this peer influence to help young people develop positive values and a sense of care and concern for others. As a youth moves up through the five levels, he or she is challenged to care for others and make more responsible choices for his or her own life. By caring for others, a person's self-esteem grows, allowing the youth to receive help and deal with difficult issues. The *Teen Ranch Level System* encourages the youth to internalize positive values and develop *Personal Character*, becoming a life-changing beacon of hope for the future.

The *Teen Ranch Level System* is used to show the amount of progress a youth has made in the Teen Ranch Program. The *Level System* is progressive, which means that more controlled behavior is expected of a youth as he or she moves through the levels. With each level lasting at least 30 days, all youth start at Foundation level when they enter the program and eventually move up through the various levels to Excellence Level, and eventually to Release Status.

*Dear Friends:*

*We appreciate your interest in the Teen Ranch residential program. It will be our privilege to work with you for the betterment of the youth from your community.*

*[Illustration omitted]*

*Together, with our experience and commitment to struggling children, we can create those important life-changing relationships so craved by our children today.*

/s/Matthew J. Koch, CEO

71

(3)

No. 07-362

FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

TEEN RANCH, INC., MATTHEW KOCH and MITCHELL KOSTER,

*Petitioners,*

v.

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## REPLY BRIEF

BENJAMIN W. BULL
GARY MCCALEB
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, Arizona 85260
(480) 444-0020

KEVIN THERIOT
*Counsel of Record*
JOEL OSTER
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000

MARK P. BUCCHI
550 Stephenson, Suite 202
Troy, Michigan 48083
(248) 589-8800

*Attorneys for the Petitioners*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS


| | Page |
|---|---|
| INTRODUCTION | 1 |
| I. FIA'S MISSTATEMENT OF THE CASE | 3 |
| II. THIS CASE PRESENTS AN IMPORTANT FEDERAL ISSUE | 6 |
| III. THE DECISION BELOW CONFLCITS WITH SUPREME COURT PRECEDENT | 8 |
| A. *Locke* | 8 |
| B. *Mitchell* and *Zelman* | 9 |
| IV. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS | 12 |
| A. *Freedom from Religion v. McCallum* | 12 |
| B. *American Jewish Congress ("AJC")* | 12 |
| CONCLUSION | 14 |

# TABLE OF AUTHORITIES

Page

CASES:

*American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) ..... 12, 13

*Freedom from Religion Foundation. Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) ..... 2, 12, 13

*Locke v. Davey*, 540 U.S. 712 (2003) ..... 2, 8, 9, 13

*Mitchell v. Helms*, 530 U.S. 793 (2000) ..... 5, 9

*Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005) ..... 8

*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) ..... *passim*

STATUTES:

28 U.S.C. § 1343(a)(3) ..... 1

42 U.S.C. § 604a ..... *passim*

42 U.S.C. § 604a(d) ..... 2

42 U.S.C. § 1983 ..... 6

Michigan Public Act, section 220 ..... 2, 4, 7, 8, 9

## INTRODUCTION

Teen Ranch's basic premise throughout this litigation is that the constitution prohibits state officials from exercising their own philosophical preferences in requiring faith-based organizations ("FBOs") to change their religious character before they can participate in the state's residential care program.[1] FIA's arguments to the contrary are based on four faulty premises. In addition, in claiming that the Establishment Clause requires them to discriminate against Teen Ranch, FIA factually relies entirely on its own volitional and arbitrary behavior.

First, FIA wrongly assumes that federal jurisdiction over Teen Ranch's constitutional claims is determined by 42 U.S.C. § 604a ("Federal Law"). Federal jurisdiction is granted by 28 U.S.C. § 1343(a)(3). The Federal Law is relevant, however, as it wholly contradicts FIA's "philosophical preferences." FIA's actions run exactly contrary to this statute and the Michigan statute that incorporates it (2003 PA 172, "Public Act"). The Federal Law and the Public Act do not support FIA's philosophical preference that FBOs not be permitted to express religious beliefs in treatment programs. To the contrary, they expressly *grant* FBOs the right to *define, practice* and *express* their

[1] Contrary to FIA's assertion, Teen Ranch never argued that FIA must force wards to go to Teen Ranch. It was Teen Ranch, not FIA, that asserted the wards' statutory and constitutional right to be free of coercion in the placement process.

beliefs in their services. *See* 42 U.S.C. § 604a(d) and Public Act § 220(4).

Second, FIA wrongly argues that *Locke v. Davey,* 540 U.S. 712 (2003), gave them, as state employees, unbridled discretion to discriminate against FBOs in all areas of government funding, based solely on their "philosophical preferences." *Locke* says just the opposite.

> the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference commands."

*Id.* at 722 n.5.

Third, FIA and the Sixth Circuit wrongly asserted a false distinction between the right to reject unwanted religious placements and "true" private choice. They claim that the private choice doctrine requires that the individual choose from some sort of *menu*. This conflicts with *Freedom from Religion v. McCallum,* 324 F.3d 880 (7th Cir. 2003), which confirmed that the *right to reject* placement in a religious half-way house proposed by a parole officer is true private choice. As FIA admits, the Seventh Circuit equated this right of refusal to the school vouchers found in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002). *See* FIA Brief at 32.

Fourth, FIA claims that youth are incapable of private choice. FIA wrongly assumes that adult proxies (including a guardian ad litem ("GAL"), case

worker, and parent), who are legally obligated to act in the best interest of the youth, cannot assist them in exercising private choice. This is inconsistent with *Zelman,* where this Court approved the selection of parochial grade schools on behalf of children by their parents and guardians.

Finally, FIA claims that the Establishment Clause requires them to discriminate against Teen Ranch because it incorporates religion into its treatment programs. FIA bases this assertion on its conclusion that funding of Teen Ranch would be "direct." This conclusion rests entirely on FIA's arbitrary *insistence* on its current placement process, an insistence that is both arbitrary and volitional, as we will demonstrate in Parts I and III.A. below. A state agency cannot avoid state, federal, and constitutional mandates of nondiscrimination by arbitrarily structuring their programs in a way that fabricates Establishment Clause concerns.

We now address FIA's arguments as they appeared in their brief.

## I. FIA'S MISSTATEMENT OF THE CASE

FIA's Statement begins by objectively misstating Teen Ranch's position. Teen Ranch *has never alleged* that FIA must affirmatively force unwilling wards to go to Teen Ranch. Teen Ranch's Policy and Procedure Directive ("Policy"), cited in FIA's Brief, *declines to accept* involuntary placements to Teen Ranch's program. *See* FIA Brief, 10b-16b. Yet, FIA has refused

even to place a youth who *with full knowledge* of Teen Ranch's religious character, *requested* to be placed at Teen Ranch.

Teen Ranch agrees that the state should not *directly* fund religious activities. The funding here, however, is *indirect.* Like all 96 private facilities in Michigan, Teen Ranch was paid on a per diem, per capita basis, not with a grant, and was paid only for services delivered to identifiable individuals. The two governing statutes guarantee that no one may be forced to go to or stay at a religious facility against their will.

Next, FIA essentially admits that its discrimination against Teen Ranch was *entirely based on its voluntary and arbitrary insistence on a placement protocol that has no statutory sanction. See* FIA Brief at 7-8. FIA's "process" is to require the ward to go to their computer's "first choice." But, FIA admits that their mode of placement is not required by any statute or regulation. Neither do they contend or show that there ever was a substantial difference between the facility their system chooses and the next preferred placement, such that a ward who rejects the proposed placement would suffer any measurable diminution in quality or effectiveness of care at odds with the statutes.[2] FIA admits that their computer

[2] Under the two statutes, unless the replacement facility is not "substantially the same as" the first choice, the objecting individual must be allowed to choose the replacement. 42 U.S.C. § 604a(e)(1); Public Act § 220(2).

cannot differentiate the facilities in terms of effectiveness. They never claim that, if their agents (caseworkers and lawyer-GALs) did assist the wards in exercising the statutory rights, the wards' conscientious choices would *not* be effectuated. They even implemented the process we say the statutes require for a brief time, and have reported no unsatisfactory results. Hence, their insistence on their preferred system of placement is patently volitional and arbitrary.

FIA repeats their assertion that Teen Ranch is a "pervasively" religious program. FIA Brief at 9-12. However, in *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of this Court excoriated the practice of discriminating against "pervasively" religious institutions as "a doctrine born of bigotry, that should be buried now." *Id.* at 829. In *Zelman*, the Court did not analyze how religious the parochial schools were before it upheld the constitutionality of a voucher program. *See* 536 U.S. at 655-56. Once a private choice system is established, it cannot be said that the *government* is impermissibly channeling youth to a religious organization. This is all the more true here, because FIA admits "religion is not a factor in the placement process." FIA Brief at 8.

Hence, FIA's Statement essentially concedes the factual groundwork upon which to conclude that their actions have been volitional, arbitrary, discriminatory, and contrary to their statutory and constitutional obligations.

## II. THIS CASE PRESENTS AN IMPORTANT FEDERAL ISSUE.

This case presents a significant federal issue – whether a state agency can defeat state, federal, and constitutional mandates of nondiscrimination by structuring a program in a way that fabricates Establishment Clause concerns. FIA, acting on its own philosophical preferences, determined that Teen Ranch must forfeit its religious beliefs and practices if it wants to participate in the state's residential care program. Yet, FIA's actions run contrary to federal and state law on this very issue. FIA cannot creatively implement its program in such a way as to avoid nondiscrimination protections in federal and state law.

FIA argues that federal courts lack jurisdiction to enforce violations of 42 U.S.C. § 604a. This is a strawman argument. Teen Ranch's constitutional claims are brought pursuant to 42 U.S.C. § 1983, not § 604a. Teen Ranch claims that FIA violated its constitutional rights when, acting on their own philosophical preferences, they required Teen Ranch to surrender its religious practices before it could participate in the state's residential care program. Both the Federal Law and the Public Act are relevant, though, because they form the statutory framework that is binding on FIA. Since FIA's actions are contrary of these statutes, it becomes all the clearer that they are acting purely upon personal philosophical preferences.

FIA argues that the Federal Law is not applicable to their care of troubled youths, and does not require them to allow FBOs who express their religious beliefs in treatment programs to participate. FIA Brief at 16-19. But the Michigan Legislature has adopted the Federal Law guidelines for *all* purposes "related to faith based involvement," including residential youth care. *See* Public Act § 220(4). Therefore, the Federal Law has been made directly applicable by the Michigan Legislature.

FIA also tries to distinguish between "religious character" and inclusion of religious content in programming. The stated purpose of the Federal Law, however, is to permit religious facilities to contract with the state "*without impairing* the religious character of such organizations," and it *defines* "religious character" to *include* the practice and expression of religious belief. *See* 42 U.S.C. § 604a(b) & (d)(1); and Teen Ranch Petition at 6 ("TR Pet") (full analysis). Hence, FIA's claim that the Federal Law protects only the private unexpressed religious beliefs of an FBO's staff is directly refuted by the text of the law itself. These provisions fall within the blanket incorporation provision of the Public Act. Hence, contrary to FIA's assertion, the right of FBOs to *do and say* religious things is protected by *both* statutes.

Admittedly, the funding in question must be the result of genuine private choice. But both statutes *mandate* private choice. Recipients of state-funded services have the right to reject placements to which they object, assuring them an acceptable placement.

*See* 42 U.S.C. § 604a(e)(1) and Public Act §§ 220(2) & (4). Hence, in no way does Teen Ranch seek "direct" funding of its programs. This renders the HHS directives cited by FIA irrelevant. To the extent that the status quo resembles "direct" funding, it is because, in derogation of these statutory directives, FIA arbitrarily insists on their first choice when placing wards. Were FIA to allow wards what the statutes clearly prescribe, their genuine private choice would become obvious.

FIA's claim regarding whether Teen Ranch has pled a "state law claim" is inapposite. Teen Ranch is not pursuing a state law claim. As the District Court noted, the statutory non-compliance Teen Ranch pled is merely illustrative of FIA's constitutional violations. *See Teen Ranch v. Udow*, 479 F. Supp. 2d 827, 832 (W.D. Mich. 2005).

## III. THE DECISION BELOW CONFLICTS WITH SUPREME COURT PRECEDENT.

### A. *Locke*

The lynchpin issue is whether *Locke* permits state officials to discriminate against FBOs on the basis of the officials' personal philosophical preferences. This Court meticulously disclaimed any such broad discretion even to state *legislatures*, much less unelected state employees. *See* 540 U.S. at 722 n.5 ("Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands"). FIA neither cites nor addresses this

express limitation. Rather, FIA simply asserts that they have the presumptive right to discriminate against FBOs based on religion. FIA Brief at 25-26.

In *Locke,* this Court carefully limited its holding to the narrow field of state funding for "the religious training of clergy." *Id.* at 722 n.5. Here, not only is the relevant activity not "the religious training of clergy," but FIA's *preferences* are *admittedly* opposed to the express purpose of the Federal Law, which Michigan adopted. *See* Public Act, § 220(4).[3] Hence, to extend *Locke* to protect FIA's actions, the Sixth Circuit completely disregarded the express limits announced by this Court.

### B. *Mitchell* and *Zelman*

FIA unsuccessfully attempts to harmonize the Sixth Circuit's opinion with *Mitchell* and *Zelman.*

FIA distorts *Mitchell.* FIA Brief at 27-28. With due respect, this Court didn't merely "attempt" to "move away from" the formalism of "who writes the check to whom." It did so. The key holding of *Mitchell* is that such formalisms are not of constitutional significance. *See* 530 U.S. at 793. No one denies this holding. Hence, FIA's arguments that *Mitchell* does not support Teen Ranch in other respects are similarly futile and irrelevant.

---

[3] *See* TR Pet. at 20 for Defendant Buchanan's admission of this personal preference.

Justice O'Connor's opinion regarding "diverting funds" is inapplicable in the private choice context. The essential effect of private choice is to render irrelevant whether, and how much of, the activity in which a willing individual participates is religious, because the *state is not* the "endorsing" actor. It is inconsistent to suggest that, even in such settings, there remain limits on how the funding may be used.[4] *See Zelman*, 536 U.S. at 662 (holding that government vouchers did not violate the Establishment Clause even though some vouchers were used by students to attend religious schools).

The "jurisdiction" of the FIA over the youth is likewise immaterial. All school age children in this country are subject to truancy laws and, in that sense, "under the jurisdiction" of their state's Department of Education. This fact clearly does *not* render them incapable of private choice.

FIA's treatment of *Zelman* is even less persuasive. In *Zelman,* this Court acknowledged the ability of responsible adults to exercise private choice for minors. As such, "youth" is not a special class, incapable of private choice. *See* 536 U.S. at 653. Nowhere does FIA confront or rebut this aspect of *Zelman. See* FIA Brief at 28-31. Yet, because adults *can* exercise

---

[4] This theory would produce the unseemly and facially unconstitutional result of tasking government employees, even federal judges, to monitor private choice programs and prevent "too much praying" from happening.

private choice for children in their care, like the parents in Cleveland, the FIA "youth" argument is meritless.

The distinctions suggested by FIA not only miss this point altogether, they also reveal the weak underpinnings of their case. The alleged lack of private choice FIA cites rests entirely on its refusal to grant wards the right to conscience-based refusal of placement required by law. If these wards are, in any sense, denied "choice" in this case, it is neither Teen Ranch, the relevant statutes, nor the mere fact that the wards are under FIA's "jurisdiction" that denies it. It is only because FIA arbitrarily insists on making placements without giving heed to the wards' religious preferences and objections, and what both state and federal law require of them.

On page 30, FIA invokes the school prayer cases, improperly equating the right to "opt-out" of certain prayers and religious observances addressed in those cases with the private choice right to avoid *being* at the religious facility *at all*. Our Petition amply demonstrates the irrelevance of the school prayer cases. TR Pet. at 30. Nowhere does FIA explain why these cases are relevant in the case of private choice placements. They cannot. The palpable constitutional difference between being allowed to sit out a prayer at a school one *must attend*, versus being *allowed* to refuse placement at a religious institution in the first place, is manifest. One cannot suffer "subtle coercion" in a facility in which one has chosen *not to be*.

## IV. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS.

### A. *Freedom from Religion v. McCallum*

In *McCallum,* the Seventh Circuit held that a parolee's right to reject his parole officer's suggestion and require placement at a secular halfway house *is* private choice on par with the *Zelman* vouchers. FIA *admits* this. FIA Brief at 32 & n.54. FIA and the Sixth Circuit simply disagree with *McCallum*, claiming that, *because the wards are minors*, private choice cannot be found unless some sort of "menu" is proffered (which, perversely, FIA refuses to proffer). *Id.* FIA cites no authority that has held that a "menu" *is* essential to *anyone's* private choice. As noted above, *Zelman* debunks the "youth" distinction. FIA and the Sixth Circuit simply conflict with *McCallum.*

### B. *American Jewish Congress ("AJC")*

Teen Ranch cites *AJC* for its holding that private choice exists when the government cannot "impermissibly channel" an individual into accepting an unwanted religious placement. *See AJC,* 399 F.3d 351, 358 (D.C. Cir. 2005). While discussing other aspects of *AJC*, FIA does not deny this holding. It offers no alternative argument as to what the essence of private choice is. Instead, FIA attempts again to distinguish *Zelman. See* FIA Brief at 28-29. In the process, FIA makes this telling admission. "In *Zelman, parents were able to make independent choices*

*about the school their child would attend.*" FIA Brief, 33 (emphasis added). Thus, FIA *admits* the essential point concerning *Zelman*, i.e., adult proxies *can* exercise private choice on behalf of children as young as first graders. This debunks the theory that private choice is somehow beyond the reach of teenagers like the wards in question. Be they hardened youth offenders, or, as FIA would have it, "emotionally fragile or damaged children," is immaterial. The wards are *all* equipped with capable adult proxies and spokesmen to effectuate the choices guaranteed by both the Federal Law and the Public Act.

In *AJC*, the court taught that the absence of "impermissible channeling" defines private choice. Here, such channeling is statutorily prohibited. FIA admits that indeed, religion plays no part in the placement process. FIA Brief at 8.

Viewed in light of the pivotal fact that FIA's actions herein have been both volitional and arbitrary, the following conclusions obtain: (a) the relevant statutes require FIA to allow Teen Ranch its religious character and forbid discrimination against it; (b) the relevant statutes require FIA to honor the wards' private choice rights; (c) FIA simply disagrees with these requirements, and refuses to implement them; (d) *Locke* does *not* authorize FIA to disregard these mandates and indulge their admitted personal "philosophical preferences;" (e) *McCallum* renders the absence of a "menu" irrelevant; (f) *Zelman* debunks the "youth" argument; and (g) *AJC* focuses the debate on the issue that the two statutes expressly

settle – impermissible channeling to religious facilities. FIA's and the Sixth Circuit's analysis cannot be harmonized with the above. They serve to subvert two decades of private choice jurisprudence and conflict with other circuits.

## CONCLUSION

Certiorari should be granted.

Respectfully submitted,

BENJAMIN W. BULL
GARY MCCALEB
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, Arizona 85260
(480) 444-0020

MARK P. BUCCHI
550 Stephenson, Suite 202
Troy, Michigan 48083
(248) 589-8800

KEVIN THERIOT
*Counsel of Record*
JOEL OSTER
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000